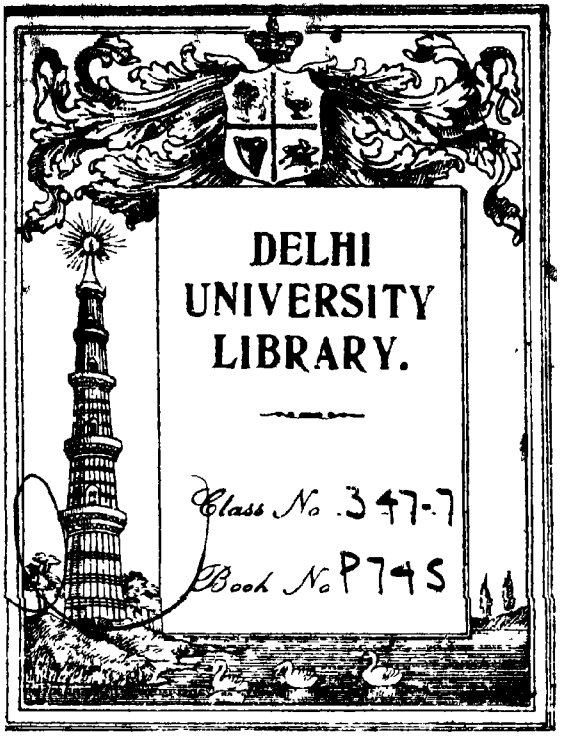
DELHI
UNIVERSITY
LIBRARY.
Class No. 347.7
Book No. P795

THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW

BY

O. PRAUSNITZ, LL.M., DR. JUR.,
OF GRAY'S INN, BARRISTER-AT-LAW.

With a Foreword

BY

R. S. T. CHORLEY, M.A.,
OF THE INNER TEMPLE, BARRISTER-AT-LAW,
SIR ERNEST CASSEL PROFESSOR OF COMMERCIAL LAW IN THE UNIVERSITY OF LONDON.

LONDON:
SWEET & MAXWELL, LTD.,
2 & 3 CHANCERY LANE, W.C.2.

1937.

[*Printed in England.*]

PRINTED IN GREAT BRITAIN BY
C F. ROWORTH LTD., 88 FETTER LANE, LONDON, E.C.4.

To

G. L. PRAUSNITZ.

FOREWORD.

FROM the point of view of the lawyer, there has been no more important development in the commerce of recent times than the growth of the use of standardized forms of contract. Confined originally, almost entirely, to the Lloyds' Policy of Marine Insurance, the tendency to make use of common forms of mercantile agreement has spread into many branches of business activity. The significance of this change has been noticed by but few lawyers, and even of these the majority have regarded the matter solely from the point of view of construction, an aspect which is, no doubt, of the greatest practical importance. The subject has, however, numerous facets, some of juristic interest and others of every-day moment. The absence of a careful study of these has for a number of years been one of the most obvious gaps in the literature of commercial law, and it is a great pleasure to find that this has now been filled in the present work of Dr. Otto Prausnitz.

In this volume, Dr. Prausnitz deals with the general considerations which govern every type of standardized contract. His firm grasp of his subject and the competence of his handling of his somewhat unfamiliar

material lead us to hope that he may be able to provide more detailed studies of some of the more important of these standardized contracts. For these would not only provide valuable studies in the general application of the principles of contract to specialised types of business transactions, but should be of considerable practical advantage to lawyers and others specialising in the trades concerned.

Dr. Prausnitz brings to his work not only a business-like handling of the English authorities, but a familiarity with German, French, Swiss and other branches of continental law where the same or similar problems are being dealt with. His use of this material considerably enhances the value of his study.

R. S. T. CHORLEY.

PREFACE.

It is not the object of this monograph to supply a complete handbook or to discuss exhaustively all the relevant questions. Its purpose is to give an exposition of the principal problems involved in a subject which in modern times has become one of practical importance in the law of contract. With regard to the presentation of the subject, I have thought it most convenient to discuss each topic separately as it is dealt with in the three principal systems of law involved in this investigation.

I am deeply indebted to many friends and colleagues for the help and encouragement they have given me in the preparation of this book. Professor R. S. T. Chorley has shown constant interest in my work, and has given me his ungrudging help and advice at every stage of the preparation of this monograph. Professor R. A. Eastwood gave me the opportunity of discussing with him a number of controversial points and questions of principle. Professor D. Hughes Parry, Mr. D.

SEABORNE DAVIES and Mr. J. GOLD read the manuscript or the proofs, and gave me much valuable advice.

I am glad to use this opportunity to express my sincere thanks to the Academic Assistance Council and its Secretary, Mr. WALTER ADAMS, without whose help this book could not have been written. I am also indebted to the Publication Fund of the University of London for the grant in aid of the publication of this book.

O. P.

3, ESSEX COURT,
TEMPLE,
E.C.4.
October, 1937.

CONTENTS.

CHAPTER V.

CHAPTER VI.

CONCLUSION.

TABLE OF CASES.

D.

E.

F.

G.

H.

I.

J.

K.

L.

M.

N.

O.

P.

R.

S.

ABBREVIATIONS.

A. C	Appeal Cases.
App Cas.	Appeal Cases.
C A.	Court of Appeal.
Can. S. C. R. ..	Canadian Supreme Court Reports.
C B. N. S.	Common Bench, New Series.
Ch.	Chancery Division.
Ch. App.	Chancery Appeals.
Com Cas.	Commercial Cases.
C. P.	Common Pleas
C. P. D.	Common Pleas Division.
Co. Rep	Reports of Sir Edward Coke.
De G. F. & J. ...	De Gex, Fisher and Jones' Chancery Reports.
East	East's Reports, King's Bench.
Eq	Equity Reports.
Ex.	Exchequer Reports.
H. L.	House of Lords.
H. L. C.	House of Lords Cases.
J. C	Judicial Committee of the Privy Council.
K. B	King's Bench Division.
L. J	Law Journal Reports.
Ll L. Rep. .	Lloyd's List Law Reports.
L Q R	Law Quarterly Review.
L R.	Law Reports
L T	Law Times Reports
P.	Probate, Divorce and Admiralty Division.
Q. B.	Queen's Bench.
Q B. D.	Queen's Bench Division.
Rev. Trim.	Revue Trimestrielle.
R. G Z.	Entscheidungen des Reichsgerichts in Zivilsachen.
S. C.	Session Cases
S. R. & O. ...	Statutory Rules and Orders.
T L. R.	Times Law Reports.
Z. A I. P. R.	Zeitschrift fur auslandisches und internationales Privatrecht

STANDARDIZATION OF COMMERCIAL CONTRACTS.

INTRODUCTION.

(1) The student of the law of contract usually limits the scope of his studies to the rules of law as laid down in the enactments of the legislature and in the decisions of the Courts Yet, as soon as he has mastered those rules, and proceeds to an investigation of their effect on the community, he is met by an enormous set of provisions which are by no means part of the common law. Wherever he turns he finds that the common law is only a skeleton around which has grown a vast number of rules Those rules, though philosophically subordinate to the law, have often reached a dominating and occasionally almost independent position within the framework of the general law. The method of bargaining on the basis of standard conditions extends very far. It prevails in the wholesale trades, the wide field of transport by land, sea, and air, the public utility services of gas, water, and electricity, all branches of insurance, some lines of banking, and, to a certain extent, to collective agreements between employers and workers However, it does not stop there, we find special rules even in the more humble circumstances of everyday life Laundries, cleaners, hotels, restaurants, theatres, and cinemas, all bargain for at least a few standard terms which vary the common law Finally, these phenomena may be encountered irrespective of nationality in all civilized countries, both in domestic and in international trade. The problems arising out of this custom

gain importance if one realizes that every individual undertaking or concern attempts to impose identical terms on its customers. In fact, it is only since the method of standardizing contractual relations became as widely spread as it is that it became a problem both for politicians and lawyers.

(2) In this work it is proposed to discuss the problem principally in its bearing on the legal profession. All its branches are affected, if legal rules set up by private persons challenge the common law. The legislature must ask itself whether it shall continue to suffer this paralegal system, as one might call it, which grows up in disregard, and often in defiance, of the law as provided by it after careful deliberations, a body of law which sometimes even alters the sociological aspect of a given provision, to say nothing of the policy of the law as a whole. If any proof be required of the last proposition, reference need only be made to the liability of the carrier by land, sea, or air under English law. Though it is doubtful whether *Southcote's Case* (*a*) laid down the law correctly as it was in 1601, there can be no doubt that the carrier's absolute liability has been taken into consideration since then, and even Sir Edward Coke, C.J., himself advised prudent bailees to stipulate exceptions in their contracts (*b*) One cannot tell whether this practice would find the approval of that staunch defender of the common law could he see its modern results.

The same is likely to happen in a system of codified law, though, at first sight, one might be inclined to believe a modern code to be so carefully thought out that the needs of the community have been met. One example may suffice Para. 455 of the German Civil Code of 1900 provides for the passing from the vendor to the purchaser of the right of ownership in the case of a hire-purchase agreement, and thereby alters the ordinary rule that this right shall pass together with the delivery of the goods subject to the intention of the parties. The paragraph

(*a*) (1601), 4 Co Rep 83 b
(*b*) T. F. T. Plucknett, Concise History of the Common Law, 2nd ed., 1936, p. 423.

was admittedly meant to be an exception, but by now it has become the rule in the machine, raw material, and various branches of the retail trade in Germany, and perhaps, with certain differences, in other countries.

It is rather remarkable that legislatures have attempted to deal only with individual abuses of such practices. So far as can be seen, with one exception, even codes which are more recent than the German one do not mention the standardized contracts as a separate entity calling for special treatment. This applies, *e.g.*, to the codes of Switzerland, Turkey and Brazil, as well as to the Spanish Draft Commercial Code (*c*) The one exception referred to is the Polish Law of Obligations of October 27th, 1933, Art 71 (*d*).

The judiciary is presented with vast problems of the applicability, validity or invalidity, and construction of standardized contracts often raising questions akin to, but nevertheless different from, terms in non-standardized agreements

All lawyers are bound to consider this special type of contract if they wish to advise clients, or if they are called upon to perform the quasi-legislative act of drafting a clause for incorporation into a standardized contract.

Finally, a new aspect has made its appearance of late Not only must the domestic legislatures ask themselves how far they are prepared to give their sanction to standardized provisions when engaged in law reform, the same question presents itself now to the international lawyer. During recent years eminent lawyers of all countries have worked at a Draft World Law of Sale of Goods, and it is known that it was extremely difficult at times to put the private contractual law in the various countries into the right perspective as against the common laws.

(*c*) A review of the latter's provisions by Llorens is to be found in Z A. I P R, vol. 3, 1929, p 956.

(*d*) Rukser, Z A. I. P. R, vol. 8, 1934, p 355, see below, p. 50.

(3) When this has been said, it is submitted that a case has been made out for the present monograph, in particular as hitherto no comprehensive study of the subject has been published in this country The author, however, is painfully conscious of the difficulty of his task, and of his limitations. What has been attempted is merely a discussion of the principal problems involved It is hoped, at a later date, to show to what an extent private contractual law ousts the common law; but that is a task too wide to be undertaken single-handed

It has been thought appropriate to deal with the subject from the aspect of comparative law England has always been too historically minded to embark on the study of foreign laws to any great extent. The position was different in the U.S A., where the *jus naturale*, which had to be gathered from various systems of law, played a leading part in the formative period of American law (*e*) However, after Professor Gutteridge's presentation of the merits of the comparative method (*f*), any further attempts at justification would appear superfluous The learned author shows how valuable such discussion may be for all countries, and he quotes the interesting cases of *Bechervaise* v *Lewis* (*g*), where Willes, J , links up the Roman law of surety and creditor with the surety's defence on equitable grounds, and *Lewis* v. *Salisbury Gold Mining Co* (*h*), where Kotzé, C J , analyzes the English rule of common employment and, by discussing the legal position under the Continental codes and the books of authority, comes to the conclusion that that rule is not part of the Roman-Dutch law (*i*). It is submitted that the

(*e*) R. Pound, The Revival of Comparative Law, 5 Tulane Law Rev 1 (1930)

(*f*) Journal of the Society of Public Teachers of Law, 1931, p 26 *et seq.* See Lord Atkin's Committee on Legal Education, 1934, p 12 (Cmd 4663)

(*g*) (1872), L R 7 C P 372.

(*h*) (1894), 11 Cape Law Journal, 137

(*i*) An example which is perhaps more complimentary to the law of this country is contained in the *Bankgeschaeftliches Formularbuch*, 8th ed , 1936, p 15, note 6 —Among the standard terms which the *Centralverband des Deutschen Bankund Bankiergewerbes* (the central organisation of German bankers) suggests that the individual bankers ought to insert in their contracts with their customers, there is a condition limiting the measure of damages in case of delays and misdirections of customers' orders to the loss of interest and makes any further damage dependent on the customer having previously

comparative method will be particularly advantageous for the subject under review For, whereas in English law the treatment of the problems concerned has so far been restricted to incidental discussions in the Courts, Continental countries have dealt with them on a wider scale. This is true notably of France, and also of Germany.

(4) Dean Roscoe Pound has stressed the importance of knowing something about the technique of each law in order to understand it (*k*) It is, therefore, thought convenient to sketch the principal differences of the laws concerned in this study and the philosophical ideas by which they are governed. With regard to the present work the following considerations would seem material A comparatively old distinction between English and Continental laws is the different degree of importance attributed to the decisions of the Courts in this country and abroad. In England the principle of precedent was inherent *since the Tudor period, and has been established in its strict* form for over a hundred years, finding its culmination in *London Street Tramways Co* v *London County Council* (*l*). Continental laws are averse to such a rule The decisions of Continental Supreme Courts command great respect, and nobody will lightly oppose, or interfere with, them. However, the fact that not only the Supreme Court itself, but also lower Courts, may depart from earlier decisions of the Supreme Courts, transforms the nature of legal discussion. If in England a decision of the House of Lords is criticized, and if one does not venture to dispute the correctness of this tribunal's conclusions as to the existing law, one has to call for legislative reform If the same happens on the Continent, the reformers are usually content with advocating another interpretation by the Court This is not the place to weigh the merits or demerits

warned the banker that such damage may ensue in the individual case This is not in accordance with the German common law, but it tallies with the English rule as laid down in the second rule of *Hadley* v *Baxendale* (1854), 9 Ex. 341, 354.

(*k*) Hierarchy of sources and forms in different systems of law· 7 Tulane Law Rev 475 (1933).

(*l*) (1898) A C 375

of each system (*m*). It may be explained by the fact that in a system of codified law the code indicates a clear road which will always mark the right way should any decision venture too far afield On the other hand, where the milestones on the road are not sections in an independent statute, but the decisions of the Courts themselves, any departure from the proper course may have disastrous effects Nevertheless, a marked continuity can be observed, at least in the decisions of the Supreme Courts. German law, moreover, has ensured a continuity by a provision in the Act regulating the jurisdiction of the Courts (*Gerichtsverfassungsgesetz*). It is provided in para 136 that if one division of the *Reichsgericht* wishes to decide a question of law otherwise than another division has previously done, a joint sitting of the members of all divisions must be convened in order to give a decision *in pleno* Still, the Continental Supreme Courts do occasionally take a stand differing from one of their own decisions or line of decisions A particularly interesting example will be mentioned at a later stage, namely, the French Court of Cassation's attitude towards the exemption of liability clause

A few references will be made to Russian law Therefore, it deserves notice that the Russian Supreme Court was intended to fulfil an entirely different function On its creation it was designed merely to guard the achievements of the revolution and the right of the proletariat, and, therefore, was not to be prejudiced by its own earlier decisions in order to meet with the demands of the day (*n*). In spite of that, perhaps inadvertently, it has worked out a more or less clear line of decisions comparable with any other Supreme Court of a "capitalist" nation Somewhat in the same direction is the attitude of German law since the National Socialist revolution In 1934 General Goering, when addressing the public prosecutors of Prussia, said: "The law and the will of the *Fuehrer* are one" (*o*)

(*m*) For an interesting discussion, see Professor A L Goodhart, 50 L Q R 40, 58 *et seq.* (1934), and Sir William Holdsworth, *ibid.* 180.

(*n*) See the discussion by Romer, J , in *First Russian Insurance Co* (*in Liqu*) v. *London and Lancashire Insurance Co , Ltd* , (1928) Ch 922.

(*o*) *Deutsche Allgemeine Zeitung* of July 13th, 1934

This maxim by itself may influence the interpretation of certain contracts More important is Art. 2 of the Act of June 28th, 1935 (*p*), which provides. "It is the task of the Supreme Court to see to it that in interpreting the enactments regard shall be had to the change of the philosophy of life and law which was brought about by the reform of the State. In order to put the Court into a position to carry out this task, unfettered by the application of past decisions which had grown out of another philosophy of life and law, be it enacted —In deciding a question of law, the Supreme Court may depart from a decision given prior to the coming into operation of this Act." It may be anticipated that the provision will also bear fruit in the field of standardized contracts should in future a term of the particularly disliked banking contracts (*q*) come up for judicial review.

Finally, the mode of legislating in countries with and without a Parliament may be of importance in considering the relative value of different laws and their relation to standardized terms of contract.

(*p*) *Reichsgesetzblatt*, I, 844
(*q*) See below, p 61 *et seq.*

Chapter I.

STANDARDIZED CONTRACTS IN THE MAKING

I.—Past and Present.

(1) Before dealing with the modern law of standardized contracts it may be convenient to inquire shortly into their history, and to ascertain the degree of economic progress which is necessary for their development In doing so, no strict chronological order can be maintained If one wishes to understand the problem one will have to ask in every individual case: Where is the historical point at which standardized contracts can begin a separate existence, and of what kind are the then prevailing legal foundations on which they can be built? The following short survey will, it is submitted, reveal that there are mainly two factors which must join forces, namely, a certain development of legal practice establishing the normal effect of certain transactions, and a certain multitude of such transactions sufficiently large to justify the term of mass contracts.

(2) There can be no doubt that the formulary work of lawyers is very old. Among the legal documents of probably all countries collections may be found of forms for certain fairly frequent agreements which call for conclusion in writing. Most of these forms, at least in this country, relate to the land law. It was only too natural for the persons engaged in drafting contracts to elaborate common forms. In England conveyancing was developed to an art, "and the common forms, whether of writs or of pleadings or of conveyances, have a habit of acquiring a customary meaning from which the Courts will not readily

depart, and of thus becoming a part of the law itself" (*a*). Apart from the land law, there is very little mediæval evidence of the evolution of a formulary system One interesting example of an "*obligacio pecuniæ*" from the thirteenth century (*b*) might arouse some interest, inasmuch as the debtor expressly waives defences to which he might in future be entitled under the general law.

Passing to a later period, we find a little book, published by T A. (Ashe), of Gray's Inn, The Law of Obligations and Conditions, London, 1693, where one might expect to find some relevant material; but not much information can be gathered from the work It contains a sort of digest of decisions relating to the meaning of covenants in contracts without any indication of such covenants having become common forms. The only reference to a subject of mercantile law concerns, as might be expected, restraint of trade (*c*). Possibly such collections helped to standardize the construction placed on "conditions" which might reappear in later contracts

(3) These few references, however, contain only one ingredient of the true standardized contract, the formulary character. The second ingredient, the mass contract, more particularly the contract which one party concludes successively with a

(*a*) Holdsworth, Land Law, p 110, see also, *e g*, Legal and Manorial Formularies edited from Originals at the British Museum and the Public Record Office in Memory of J P Gilson, 1933

(*b*) Published in the Formulary mentioned in the previous note —*Et ego et heredes mei restaurabimus eisdem* (to the lenders) *et reddemus eis aut uni eorum, aut eorum certo nuncio. Et ego et heredes mei super dampnum et expensas per simplex verbum suum sine alterius honere probacionis, renunciando pro me et heredibus meis super his omnibus et singulis omni juris et auxilio canonici et civilis, omni consuetudine* (sic) *et statuto, omnibus literis a quacumque curia impetratis vel impetrandis, regie prohibicioni et alii exceptioni et defeccione que possunt obici contra hoc instrumentum vel factum, vel que mihi et heredibus meis prodesse et dictis mercatoribus vel eorum heredibus nocere, omnia et singula supradicta factis sacrosanctis evangeliis pro me et heredibus meis super his omnibus observare promitto et adimplere et in nullo contravenire volo, et concedo quod a dictis mercatoribus vel ab uno eorum in solidum in quocunque loco ego et heredes mei valeamus super his omnibus et singulis convenire*

(*c*) P 236 "Condition to do things belonging to a Trade A Condition to make all such Linnen as he should want during his living single, the sempstress is not bound to find Linen, nor a Tailor Materials, the Intent may guide the Contracts; *contra*, of a Shoe-maker, Goldsmith, &c · 1 Keble, 466, *Oates* versus *Thornel*."

great number of persons, remains to be described. It is in the field of mercantile law that these contracts first made their appearance. Still, even in mercantile contracts entered into frequently by the same person, we find ingredients which are foreign to the modern conception The early examples of such contracts relating to marine insurance, shipping, and sale of goods are concluded before notaries public so that the direct pressure exercised by the one party becomes less apparent than later on, when no legal intermediary disturbs the true relations between the parties

(4) First, as to marine insurance. This business has a long tradition both in England and abroad, the first English reported cases occurring as early as the first half of the sixteenth century (*d*). The preamble to Queen Elizabeth's "Act concerninge matters of Assurances amongste merchants," 1601, shows that disputes in insurance matters were always decided by arbitrators who were appointed by the Lord Mayor of the City of London from the ranks of the merchants This system worked well until some persons broke away, and forced the assured to sue each underwriter in the King's Court. In order to do away with this hardship a special Court for insurance matters was set up It consisted of two doctors of civil law, two common lawyers and eight merchants (*e*) The new departure was not successful, and the Court fell into disuse after a generation or two. The fact that the legislature in those early days had to intervene, and that the question of insurance was also drawn into the monopoly discussions when Elizabeth granted a patent to Richard Chandler, which, however, was never enforced (*f*), are evidence of how insurance business spread. Therefore we cannot wonder that the sixteenth and seventeenth centuries witnessed ever recurring forms of policies. Hardly any of the modern problems appear to arise in that period.

(*d*) Holdsworth, History of English Law, vol 8, p 283, W A Bewes, The Romance of the Law Merchant, 1923, p. 66.

(*e*) 8 Holdsworth, H. E L, p 287 *et seq*, F. Martin, History of Lloyds, 1876, pp 34, 49

(*f*) C Wright and C E. Fayle, History of Lloyds, 1928, p. 35.

The policies are not yet drafted in common form by the insurers. Their authors must still be sought among the notaries (*g*), and the business itself was carried on by an unorganised number of persons, "bankers, moneylenders and others, who pursued their own avocations besides, at their private offices. They 'underwrote' their names for a certain sum to a risk, or 'took a line,' prepared either to gain or loose comparatively small sums, an opportunity the more desirable on account of other investments being scarce" (*h*). Thus, what developed into common form policies in those days did so more as a matter of convenience for the notaries than as a result of a definite policy on the part of the insurers. It is not until Nicolas Magens published his "Essays on Insurances" in 1775 that we find anything approaching modern problems in insurance policies (*i*).

(5) As far as can be gathered, the situation was much the same in France. The "*Guidon, stile et Usance des Marchands qui mettent à la mer,*" which was first published in 1607 (*k*), mentions in its second chapter a number of usual clauses appearing in marine policies.

(6) The law of the more ancient seafaring nations reveals a somewhat different picture In Italy, Spain and the Netherlands, the easy-going time of experiments had already passed. Insurance practice had attracted the lawyer's and, what is more, the statesman's attention. Only very few instances can be given here, but it should be noted that in Florence five Deputies were appointed for regulating insurances. It was their business to arbitrate in cases of dispute; more important was the influence they exercised on the form of conditions inserted in policies. To give an idea of their work one article may be quoted,

---

(*g*) Martin, *l c.*, p 35

(*h*) Martin, *l.c.*, p. 52, the same appears to have been the case in Rouen. See W R Dawson, Marine Underwriting at Rouen, 1727—1742 (London, 1931), pp xvii and 77 incidentally to an individual insurance on a ship the syndicate authorises underwriters to take shares of a risk "on such clauses and conditions as they shall agree with the underwriters of the four other insurance offices of this city" (*i*) See vol 1, § 6, p 4, and below, p. 17.

(*k*) I used the edition Rouen, 1645, for Germany, see Carl Ritter, *Das Recht der Seeversicherung*, vol. I, 1922, p 2 *et seq*

published by the Deputies on January 28th, 1523, which also attracted Magens' attention (*l*): "Moreover, notwithstanding the above Prohibition, that no Insurance, during one year, shall be made under the general expression of, 'on all and every Passage,' 'tis declared, That, in order to give all possible Assistance to the Merchants, it shall be lawful for them, in case they think proper, to cause Insurances to be made 'on all and every Passage,' but under such Conditions and Limitations as these Deputies shall think proper." Still, these malpractices, if indeed they deserve this name at all, cannot yet have reached any formidable extent. J L M Casaregis (*m*), in his standard work on mercantile law, fails to mention them He limits the discussion to purely legal questions At one point he deals generally with the difficulty arising out of documents being drawn by notaries and at the same time being contracts to be construed according to the intention of the parties He comes to the conclusion that the last rule should prevail (*n*) As regards contracts of insurance, their terms shall be the *lex contractus*, and in the public interest more importance must be attributed to mercantile usage than to the rigour of the law (*o*) In Spain, King Philip II went the length of prescribing certain forms of marine policies (*p*), and he did the same in the Spanish Netherlands a few years later (*q*)

(*l*) Vol. 2, p 3. (*m*) *Discursus Legales de Commercio*, 1740

(*n*) *Discursus* 166, No 22· *verba notarii in instrumento apposita, censentur adhibita de voluntate partium*

(*o*) *Discursus* I, 1—5 *In materia assecurationis principaliter inhaerendum est verbis assecurationis, quinimmo haec pro lege habenda sunt, nec ab his recedere debemus, quia contrahentium voluntas melius haberi non potest . practicandus non est cum Juris apicibus, et rigoribus, sed servandae sunt mercatorum consuetudines, eorumque styli ad publicam utilitatem recepti.*

(*p*) Ordinance made in Valladolid, July 14th, 1556, Magens, *l c*, II No 105 "The general Policy on going to the Indies; let it be, and it is granted, in the following term . ", No 119, general policy on coming from the Indies; No. 128, a general policy for insuring on the bodies of ships, easier times follow Cp. No 131, containing form of policy used at Cadiz in 1725, where apparently no State interference any longer exists.

(*q*) Magens, *l c*, vol 2, p 14 *et seq*, Extract from Ordinance of King Philip II concerning Navigation, 1563, p 23· "Ordinance of Assurances . . All Assurances upon Goods and Merchandize shall for the future be made after the custom of the Exchange at Antwerp, and Policies of Assurance shall be of the following Tenor or Substance, without adding any more Clauses thereunto." There follows an elaborate form of marine policy at p. 29, No 69 "Ordaining further, that all Contracts, Policies of Assurance, and Bonds of

(7) We now turn to the contract of affreightment. It is well known that memoranda in writing were already made in the early Middle Ages As time went on, the writing lost its merely evidentiary character and became necessary for the conclusion of the contract itself (*r*) In England, as early as 1369, mention was made of a ship's *chartre de freight ou endenture* (*s*), and also bills of lading seem to date from this period, though the first one to be evidenced dates from 1538 (*t*); no exception clauses appear until *Holderness* v *Elderness* in 1545 (*u*) They related to the shipowner's liability in respect of perils of the sea, which was uncertain (*x*) Apart from that it would seem that here, as in the case of marine insurance, the clauses were designed not so much to evade the too harsh consequences of the law as to build up a custom which might become law at some future date, no general law concerning those matters can be said to have existed in England at that time. For this reason a charter-party usually declares " that it is and all things contained according to the law of Oléron " (*y*) Malynes' *Lex Mercatoria*, first published in the reign of James I, presents substantial evidence to the effect that charter-parties and bills of lading were for some time used in common form (*z*). Malynes says

---

Bottomree, or other things relating thereunto, which are not made in Conformity or Contrary to what is above stipulated, or in any Way diminishing or derogating therefrom, or from the above Ordinance, in regard to the fitting out of ships shall be null, and of no Value or Force." It might be mentioned incidentally that this Ordinance constituted the principal source of Grotius' exposition of the law of insurance. See Hugo Grotius, The Jurisprudence of Holland, edited by R W Lee, vol 1, 1926, p 419, Book 3, ch 24, Commentary by Professor Lee, vol 2, 1936, p 319

(*r*) Max Pappenheim, *Die geschichtliche Entwicklung des Seehandels und seines Rechts, Schriften des Vereins fuer Socialpolitik*, vol 103, I, 2, 1903, pp 127 *et seq*, 140

(*s*) Bennett, History and Present Position of Bills of Lading, 1914, p. 2

(*t*) E. G. M Fletcher, The Carrier's Liability, 1932, pp 52, 85

(*u*) *Ibid*, pp 52, 86 (*x*) *Ibid*, pp xiii, 52

(*y*) Malynes, *Lex Mercatoria*, 1656 ed, pp 97, 98

(*z*) *Ibid*, Part I, ch 21, contains an " ordinary form of charter-party " as made before a notary public, which runs as follows (p 99).—" A. B., Master of the good Ship or Fly-boat, called the Red Lyon of Ratcliffe, of the burthen of 120 Tunnes or thereabouts, riding at Anchors in the River of Thames, acknowledge to have letten to freight to C D the Merchant his said Ship, and doth promise to prepare to make ready the same within ten dales, to take in such goods, as the said Merchant shall lade or cause to be laden in her, to make (by God's grace) with the first convenient weather and wind (after the

expressly that "these bills of lading are commonly to be had in print in all places, and in severall languages."

In 1680 we find a little collection of documents, entitled New Book of Instruments (*a*), which also contains a particular form of a charter-party providing for a special mode of payment by instalments (*b*), and a bottomry bond (*c*).

---

expiration of the said daies) a voyage from the City of London, to the Towne of Saint Lucar de Barameda in Spain, and there to deliver all the said goods, well conditioned, and in such sort as they were delivered unto him, to such Merchant or Factor, as the Merchant the fraighter shall nominate and appoint, according to the Bils of lading made or to be made thereof, and there to remaine with the said Ship the space of twenty daies, to take in and receive all such goods, as the said Factor or any other by his appointment shall lade into her, and as the said Ship may conveniently carry, and being so laden, to returne backe againe for the said City of London, and there to deliver the said goods also well conditioned, to the said C D. the Merchant, or his assignes And the said Master doth further covenant with the said Merchant, that his Ship shall be furnished with twelve able men and a boy, ten pieces of Iron Ordnance, namely, two Sakers, Six Minions, two Falcons, and eight Muskets, with powder, shot, and all things necessary, as Cables, Sayles, Ropes, Anchors and Victuals requisite for such or the like voyage, &c. And hereupon C D the Merchant and Fraighter, doth likewise covenant with the said Master, or all the said Merchants do covenant with him, every one for his tunnage as aforesaid, that he or they and either of them, will lade or cause to be laden (within the daies limited) the said Ship, with such and such commodities accordingly, pesterable wares or goods excepted, which are goods of great volume and cumbersome, whereof no true computation for tunnage can be had so that the fraight of such kinde of goods is made accordingly

"And the said Merchant doth further covenant to pay unto the Master, three pounds or more for the fraight of every Tunne lading upon the full discharge of his said Ship, and delivery of the said goods at London aforesaid, accounting two and twenty hundred and a halfe, or so many kintals for a Tunne, and in like manner for two Pipes or Butts, foure Hogsheads and other commodities, rated for the Tunne or Last, as foure Chests of Sugar, six Barrels of any other Commodity for a Tunne with Primage, Petilodeminage, and sometimes Pilotage, according to the accustomed manner in the like voiages, &c., binding themselves to each other for the performance thereof in a summe of money, Nominæ Pœnæ, with such other clauses, conditions, cautions or other agreements as may be concluded between them, which being well expressed, preventeth all those and the like questions, which the Civilians doe discourse upon, as the following may be for an instance . . Measurement of fraight; if the like Ship or any other (being fraighted by the great for a summe certaine) happen to be cast away, there is nothing put for fraight, but if the Ship be fraighted by the Tunne, or pieces of Commodities laden and cast away and some saved, then it is made questionable, whether any fraight be due for the goods saved pro rata albeit there is none due at all; for the Assurors are not to be abridged herein by any fraight." Furthermore, the question is mentioned whether freight is due for slaves who have died in transit See p 101 for the example of a time charter.

(*a*) The Lawyer's Library, 2nd ed., 1709.

(*b*) *Ibid.*, pp. 101—103.

(*c*) *Ibid.*, pp. 109, 110.

(8) As might be expected, Malynes also gives an example of a promissory note (*d*), which, however, is of less importance for the present purpose than his advice on contracts of purchase of goods from sellers, or sale of goods to buyers abroad, made before a notary public (*e*). He advises merchants to take care always to insert special terms relating to the price and the rate of exchange; they ought to provide for the passing of the risk, and for the risk of sub-sales and bad debts, for the time of payment, factor's commission and warranty of good and merchantable quality There can be no doubt that the notaries kept collections of forms, and that such forms as well as books like that of Malynes helped to stereotype international sales However, it does not appear that sales were already mass contracts which induced one undertaking to adopt standard contracts giving rise to modern problems.

Finally, Malynes mentions (*f*) that a general authorization clause is commonly inserted in contracts of agency between merchants and their factors It runs "Let all things be done as shall be thought most expedient or convenient," and, according to the writer, the civilians agreed that that clause should be "left to the interpretation of arbitrators when any question ariseth, which is also in many more questions concerning merchants, noted in most of their law-books" The last remark is of general importance. Though old in substance it shows part of the difficulties which have arisen in the era of modern law. For Roman law the business questions of merchants were part of the general problem, the elucidation of the parties' intention. Out of this self-restriction grew the autonomy of the mercantile law which presented, and still presents, difficult problems to the lawyer who wishes to subject an ever-growing province to the rule of the general law.

(9) So far our survey has shown how far contracts had already been stereotyped through the defects of the general law, the

(*d*) Part I , ch. 13, 1656 ed , p. 74.
(*e*) Part I., ch. 19, 1656 ed., p. 90 *et seq.*
(*f*) Part I., ch. 15, 1656 ed , p. 80.

needs of the trade and the reservoir of legal experience, the notaries. It only needed one more factor to turn this mass of experience into a weapon. This new factor was the economic power of individual undertakings As long as marine underwriters were not united and carried on their business as described above, it was no matter of great importance to persons insured or the general public that marine policies usually contained certain clauses or entirely took the shape of common forms, but as soon as marine underwriters combined, either by creating big undertakings, or by constantly employing the same brokers or agents, they represented an economic power against which the assured had nothing to put. It is not astonishing to find this recognized by a lawyer for the first time in France. The great Pothier drew attention to the fact (*g*) that brokers and agents availed themselves of printed forms into which "they inserted all clauses they could think of in order to favour the parties they represented." The assured was then presented with this form for signature, and he failed to inform himself about its contents, being satisfied to see that the sum insured and the premium were correct "Thereby they found themselves bound by disadvantageous clauses which they had not intended." Soon the legislature intervened On December 7th, 1757, an Ordinance was published by the Admiralty enacting that all clauses in marine policies which attempted to contract out of the provisions of the *Ordonnance de la Marine* or the general common law should only be valid if written by hand instead of being in print. Pothier thought that measure "very wise," but Valin, the well-known commentator of the *Ordonnance de la Marine*, considers a surprise of the assured more likely in case of written clauses than with printed ones which are, after all, notorious and with the contents of which the assured has become familiar by usage. In fact the Ordinance of 1757 had no lasting effect and was not re-enacted in the *Code de Commerce*. Here then we find for the first time a full dress argument on the merits

(*g*) *Traité du Contrat d'Assurance*, No 103; see Perreau, *Revue Trimestrielle de Droit Civil*, vol 26, 1927, p. 303 *et seq.*

and demerits of the formulary system enlisted to assist the economically powerful.

(10) The substance can be observed before that time. It was said above that standardized conditions appeared wherever an economically mighty person entered into a number of identical contracts with individuals standing by themselves. The phenomenon is quite independent of any particular time Indeed, it crops up as early as the twelfth and thirteenth centuries with regard to the transport of pilgrims to the Holy Land in connection with, and after, the crusades The conditions under which these persons sailed from Arles or Marseilles to Palestine surpass imagination For instance, very strict conditions must have been made concerning space The contracts themselves no longer exist. Their contents can only be guessed by reading the bye-laws of Arles (twelfth century) and Marseilles (thirteenth century), which were intended to remedy the worst defects. According to one of those ordinances the space for one pilgrim should be 6½ to 7 handbreadths long and 2½ handbreadths wide, provided that two pilgrims may be housed in this space "if it is customary so to place them in the ships, that the one should put his feet next to the head of the other" (*h*). The borough authorities were required to safeguard the observance of those minimum conditions

Passing to more modern times, we find an extremely illuminating example related by Magens (*i*) about the business practice of the East India Company. The passage runs as follows, viz.. "In London, where the East India Co hire all Ships they employ in their Trade from private People, there is a general Condition in the charter-parties, that every Ship shall make good all Damages that may happen to the Goods on board her, and farther, that the Company shall contribute nothing to any Damage the Ships may receive by either cutting or carrying away Masts, Losing

(*h*) Max Pappenheim, *l.c*, p. 145 *et seq*, *idem, Zur Entwicklungsgeschichte des Seefrachtvertrages, Zeitschrift der Savigny Stiftung für Rechtsgeschichte, Germ. Abt*, vol. 51, 1931, p. 179, note 1

(*i*) Essay on Insurances, 1755, § 52, p 55.

Cables, and Anchors, or any other direful Effects of tempestuous Weather· So that what general Custom has made a gross Average to be borne by Ship and Cargo, falls solely on the owners of those Vessels the Company employ. And the Loss of Cables, Anchors, Sails and Masts, which cannot be replaced in India, but on much more costly Terms than in England . . has occasioned great Disputes and Controversies between Insurers and Owners of those ships, so that of late some Insurers will not underwrite, without the express Condition of being free from all Average" Clearly, this is a new phenomenon! No longer do individuals bargain for this or that provision in the contract, no longer does the notary public give legal shape to the sometimes crude words of the lay parties The control of the wording of those contracts has passed into the hands of the concern, and the drafting into the hands of its legal adviser, though the notary may still give his official sanction In the trades affected it is henceforth futile for an individual to attempt any modification, and incorrect for the economist and lawyer to classify or judge such arrangements as standing on an equal footing with individual agreements It is the freedom of contract theory pushed to its extreme, thus reaching its climax and resulting in fetters to one of the parties concerned

(11) Before leaving this short historical sketch it might be of interest to glance at those clauses and legal questions connected therewith which prior to modern times were already of special importance To give only a few examples. In marine insurance the "lost or not lost" clause was considered valid unless the assured knew of the loss (*k*), the sue and labour clause can be found (*l*), and the ordinances providing for the assured running part of the risk are commonly disregarded (*m*) As to carriage by sea the main interest centres round the exemption of liability clause. Although certain exceptions occur in

---

(*k*) Malynes, *Lex Mercatoria*, Part I , ch 24, 1656 ed., p. 107.
(*l*) Malynes, *l c.*, ch 25, p. 111
(*m*) Magens, Essay on Insurances, vol. 1, p. 5, § 8

sixteenth century bills of lading (*n*), they do not become general until the eighteenth century (*o*). We also encounter the first instance of providing for the payment of freight. Again, Malynes furnishes evidence which is worthy of being quoted in full (*p*), viz - "In the year 1587. the like matter was in question with five Ships comming back without their lading from Ligorn (Livorno), and Civita Vecchia into England, whereof my selfe was one of the Merchants that had fraighted them, and did intend to receive lading there in Allome, but the Gallies of Don Andrea Doria intending to surprise those ships (the Grand Armada being preparing in Spaine) they came all of them away without their lading, some two of these Ships had lien (been ?) out all their time conditioned by their Charter-party, to take in their lading, and the Master had Notariall protests against the factors that they should have laden them These were by the Law of the Admiralty adjudged to have deserved their whole fraight Two other Ships having not staied there their abiding daies, nor made any protest as aforesaid, could not be found to have deserved any fraight at all, although they were laden outward bound The (*q*) fifth Ship had a condition or Proviso in her Charter-party, That if it should happen that in her comming back out of the Straits, she should be taken or cast away, nevertheless the fraight outwards (which was accounted halfe) should be paied, and that halfe was adjudged unto the Master, and no more, having not tarried there his appropriated time And if this Proviso had not been, he could not have recovered anything, for when Ships are fraighted going and comming, there is nothing due for fraight untill the whole Voyage be performed So that if she perish, or be taken in the comming home, all is lost, and nothing due unto her for any freight outwards whereof I have also had experience by another Ship."

(*n*) Fletcher, Carrier's Liability, pp 52, 81

(*o*) Fletcher, *l c*, pp 63, 89

(*p*) *Lex Mercatoria*, Part I, ch 21, 1656 ed., p. 98.

(*q*) At this point the words "condition maketh law" are printed in the margin.

In those early days very little was said about abuses and general difficulties arising out of the application of standard conditions One short reference to this question is made by Magens (*r*), he remarks on the fact that in policies printed and written conditions frequently contradict each other, but he offers no solution beyond the statement that it is necessary to "comprehend the transaction itself well" if the true intention of the parties shall be ascertained and justice be done between them The applicability of standard conditions does not appear as a special problem until common carriers begin to "bring home" to passengers such conditions in the nineteenth century This, however, belongs to the description of the modern law

II.—The Economic Struggle.

(1) In the political, economic, and cultural life of the nations the law plays a somewhat humble part Like the proctor in a university, it is the lawyer's task to see that the life of the community continues undisturbed and that nobody oversteps his bounds Yet the law has to adapt itself to the changes of the general conditions so that it may be in a position to exercise its function more effectively. It may even happen that the lawyer has to guard against future events, thus entering into the statesman's province; but in that case, just as in the case where a law is intended to bring about a change of conditions, the lawyer will act as the stateman's assistant Thus the law will always reflect the whole life of a nation This is true of the law in general and of every department, however unimportant it may appear at first sight. One of these departments is the law of contract, and part of this is the law of standardized contracts into which we at present enquire Indeed, the law of standardized contracts is the outcome of various movements, political as well as economic, which have gone on during the last two or three centuries After having ascertained the general history of those phenomena, it will be well to enquire into the

(*r*) *L.c.*, vol. 1, p. 4, § 6.

considerations which lead to the setting up of standardized conditions, and to determine the living persons who create them, and in whose interest they are created.

(2) In attempting to answer the second question, first we are immediately confronted with economic evolutions and revolutions. For it ought to be borne in mind that the standard terms in contracts are only one method by which individuals or groups of individuals pursue their policies Thus, in trying to show who actually makes standard terms, we shall find behind the screen of the law the struggle between competing firms belonging to almost all the important trades, between the individual undertaker and the concern and cartel, between whole trades and their customers, and finally between all those groups taken together and the State.

(3) It is too well known to call for any description here that individual business firms set up standard terms for the contracts to be entered into between them and their customers. If, however, an organisation is formed in any trade, it often happens that, together with certain other provisions, standard contracts are prescribed for the use by all members of the organisation and their respective customers Let it be remembered that a seemingly technical point can jeopardise the whole success of a cartel. Suppose such an association is formed with a view to fixing a uniform selling price, in that case it may make all the difference if one of the members extends the credit period, or gives a stricter warranty to the purchaser Thus the fixing of standard prices must as often as not be supported by more or less numerous provisions of a technical character The law of the firm becomes the law of a group of firms, or, as French authors call it, a *droit corporatif* is in the making Two methods might be used by such a cartel. It might prescribe standard contracts for the use by every member, or, it might provide the latter only with a skeleton contract, and allow them to insert special conditions to suit their individual fancy (*s*). Such

(*s*) For this and the following, see H Grossmann-Doerth, *Ueberseekauf*, 1930, p 69 *et seq*, E Rabel, *Recht des Warenkaufs*, 1936, p 38

cartelisation of standard terms is, for example, to be found in the whole of the raw material oversea trade In this country the Incorporated Oil Seed Association, the London Oil and Tallow Trade Association, the Liverpool Cotton Association, the Refined Sugar Association in London, the London Jute Association, the London Corn Trade Association are instances In the U S A the Silk Association of America deserves mention, and in Germany the *Verein der Getreidehändler der Hamburger Boerse*, the *Bremer Baumwollboerse*, the *Verein der am Kaffeehandel beteiligten Firmen* in Hamburg, and the *Verein zur Foerderung des Hamburger Handels mit Kolonialwaren* and *getrockneten Fruechten* (*Warenverein der Hamburger Boerse*) *e V* In the field of carriage by sea, the Institute charters are examples, and in land transport powerful cartels also provide for standard forms of contract between member firms and their customers (*t*) Even where no strict cartels are formed it may happen that at least a bureau is established which gives information to members about the best method of safeguarding themselves against the risks of their business Examples of this procedure are the Life, Fire and Accident Insurance Offices in England, and in Germany, *e g*, the *Centralverband des Deutschen Bank und Bankiergewerbes* (Central Association of German Bankers) The latter publishes from time to time a book containing forms of banking contracts and suggestions of useful clauses In spite of the great measure of State control, no uniform conditions have hitherto been agreed upon (*u*).

(4) So far, examples have been given of one party setting up rules and imposing them upon the other party Where, however, the customers are equally well organised a battle may ensue and end with a compromise, both parties contributing to the form of standardized contracts to be employed in individual cases This state of affairs does not often arise Its most striking examples are, of course, the collective labour agreements, but

(*t*) For the position in Germany, see L Raiser, *Das Recht der Allgemeinen Geschaftsbedingungen*, 1936, p 36 *et seq.*

(*u*) *Bankgeschaeftliches Formularbuch, herausgegeben vom Centralverband des Deutschen Bank-u. Bankiergewerbes*, 8th ed , 1936, Preface.

they stand on a somewhat different footing. In the field of mercantile law England furnishes hardly one important example (*x*) of such procedure. However, joint settlements of standard conditions by members of different trades did take place in connection with international agreements Thus English shipowners and merchants took part in the discussions leading to the Hague Rules, which were later embodied in the Carriage of Goods by Sea Act. 1924, likewise English shipowners, merchants, and underwriters collaborated when the York-Antwerp Rules relating to general average were worked out

One must turn to France to find a dramatic struggle between insurers and insured persons, it continued throughout the nineteenth and during the first twelve years of this century The battle was fought over insurance conditions relating to fire insurance The dispute arose in this way. The common law of France made no provision for insurance contracts. The *Code Civil* barely mentioned insurance in art. 1964, and arts 332—396 of the *Code de Commerce* only dealt with marine insurance. When in the course of the nineteenth century insurance other than marine insurance developed, and when one realized that the analogous application of marine insurance law produced difficulties, the "terrestrial" insurers endeavoured to create a law more suitable to their trade. It is not astonishing that the new law, which took the form of clauses inserted in the policies, merely noticed the insurers' interest and left the assured at the formers' mercy. At this stage a remarkable thing happened Persons compelled to take out fire insurances rallied and formed a *Ligue des Assurés*, and between the league and the insurers' organisations a policy type was eventually bargained for in 1912 which gave reasonable satisfaction to both parties (*y*) The economic struggle between

(*x*) But see Arnould, Marine Insurance, s 901, with regard to the influence of the merchants on the drafting of the F P A. clause in marine policies

(*y*) Planiol and Ripert, *Traité Pratique de Droit Civil*, vol 11, p 567 *et seq.*, Perreau, *Rev Trim*, vol 26, 1927, p 306, where further literature is cited. A similar development led to the French bill of lading in 1914· see Planiol and Ripert, *l c*, vol. 6, p 160, Ripert, *Droit Maritime*, 3rd ed, II., No. 1813—1.

two strong groups of the community drew the Government's attention to this branch of the law. The Great War prevented any further measures for the time being, but soon after its end work on this subject was resumed. On March 8th, 1922, an Ordinance was promulgated providing for a number of clauses which had to be inserted in policies of insurance. It was followed on July 13th, 1930, by an organic law of the insurance contract, whereby France fell into line with other Continental countries such as Germany, Austria and Switzerland.

Similar compromises with regard to marine insurance are the General Conditions of German Marine Underwriters (*Allgemeine Deutsche Seeversicherungsbedingungen*), which were agreed on in 1919 after consultations between marine underwriters, Chambers of Commerce and merchants' organisations (*z*), a similar procedure was adopted in the case of the General Conditions of German Land Carriers (*Allgemeine Deutsche Spediteurbedingungen*), 1927 (*a*), and in the U S A with regard to the uniform bill of lading, which was negotiated between associated buyers and sellers (*b*).

(5) State influence on the formation of standard terms has already been mentioned incidentally. It is now time to consider this aspect a little more closely. Broadly speaking, State influence is dictated by two considerations. The State may act as a guardian of the weak or it may pursue an active policy endeavouring to shape the whole economic structure of the people according to those ideals Just as the omission of apparently technical provisions in the *charta* of a cartel may defeat the policy of such organisation, so is this equally true of the policy of the State (*c*) Between the two extremes several forms of State influence are possible It may be content with giving a

(*z*) C Ritter, *Das Recht der Seeversicherung*, vol. 1, p 5; Ernst Bruck, *Materialien zu den Allgemeinen Seeversicherungsbedingungen*, 2 vols., 1919.

(*a*) Raiser, *Kontrahierungszwang und Freizeichnung*, Z A I P R, vol. 8, p. 31

(*b*) K N. Llewellyn, s.v Contract U S A, in Enc Brit

(*c*) International pacts may influence the State as was the case with the German Railways in consequence of the Dawes Plan.

sort of friendly advice, as is the case with the Statutory Forms of Will (*d*) and the Statutory Form of Conditions of Sale of Land issued by the Lord Chancellor by authority of sect. 46 of the Law of Property Act, 1925 (*e*) This, however, is outside the province of mercantile law.

Again, under certain conditions a highly organised State may act as an intermediary between the parties, and may bring pressure to bear in order to bring about a compromise. Collective labour agreements in Germany since 1918, in U S A , France, and in some cases also in England, are here in point Apart from that, Germany has furnished a particularly interesting example a few years ago Since the war, relations between landlords and tenants had been strained The scarcity of suitable tenements and flats had produced a substantial preponderance of power on the landlords' part, which even the existing tenants' associations were not able to mitigate sufficiently After the National Socialist revolution, the respective associations were brought together by the National Socialist Jurists Association and the *Reich* Ministry of Justice, and the negotiations resulted in an uniform contract of tenancy to be applied throughout the *Reich* (*f*) The contract is not law, but the totalitarian State is in a position, principally through the offices of the National Socialist Party, to ensure its application (*g*).

We are led one step further if we find that a Government department has to sanction certain general terms and conditions

---

(*d*) S. R & O., 1925, p 887, Gibson, Conveyancing, 14th ed , p 549 "Unless so referred to (by the testator) they do not affect the will"

(*e*) S R & O , 1925, p 883, Gibson, *l c* , p 77 *et seq.*

(*f*) Raiser, *Recht der Allgemeinen Geschaftsbedingungen*, p. 47, Vollmer, *Juristische Wochenschrift*, 1934, p. 1385

(*g*) This *Einheitsmietvertrag* restored the law of the Civil Code of 1900 in two respects (1) the tenant is again allowed to set off claims for repairs from the rent (cp Landlord and Tenant Act, 1927, s 11, and for history, O Prausnitz, *Forderungsverrechnung*, p 162), (2) the tenant shall be liable only for negligent damage On the other hand, § 2 of the contract shows a new departure characteristic of the new era None of the parties is allowed to give notice without a cogent reason, even though the contractual time limit (*Frist*) has expired To give notice without cogent reason makes the offending party liable for damages, which are limited to one month's rent and removal costs respectively

This is the case, for example, with oversea passage contracts under sect 320 of the Merchant Shipping Act, 1894, furthermore with insurance in Austria and Russia (*h*). With regard to banks, it may soon come to this in Germany as a consequence of the *Reichsgesetz ueber das Kreditwesen* of December 5th, 1934 (*i*); the German auctioneers' conditions already require such sanction (*k*)

Finally, in suitable cases terms may be made statutory, as, *e g*, the Railway Terms, 1927, under the Railways Act, 1921 (*l*), and insurance contracts in most Continental countries. An important instance in the latter trade in England is the Industrial Assurance Act, 1923, which, in sects. 20 *et seq*, sets out a number of terms which must be contained in policies, and likewise the various statutes dealing with third party insurance against road accidents. When this stage is reached the terms become statute law, and pass beyond the scope of this book. To make terms statutory is sometimes necessary, but it is not altogether beneficial to the customer in whose interest the State intervenes For, no sooner has a term contained, say, in an insurance policy become statutory, the *ignorantia juris* rule applies, and the assured is bound irrespective of his knowledge (*m*) To prevent hardship, the statute should always provide for the express inclusion in the contracts of such statutory terms, which cast a duty on the customer, thus giving the latter an opportunity to acquaint himself with the law.

(6) In discussing the economic forces concerned, it is too often supposed that they are guided by sheer avarice. This feeling is by no means correct in the majority of cases Often genuine and legitimate interests are sought to be protected. In the sale of goods it is not only the struggle between manufacturers, exporters, importers and the ultimate buyers of goods which contributes to the formation of individual clauses, but

(*h*) Serebrowski, *Ostrecht*, vol 3, 1927, pp. 138, 141.
(*i*) *Reichsgesetzblatt*, I., 1203, Raiser, *l c*, p. 50
(*k*) Act of October 16th, 1934, *Reichsgesetzblatt*, I, 974, Raiser, *l.c*, p 52, as to compulsory cartels, see Raiser, *l c.*, p 53 *et seq*
(*l*) See also generally, Fletcher, *l c*, p xv
(*m*) A German example is RGZ 125, 193.

also the nature of the goods and the character of the particular market. The latter consideration is to be found in the highly speculative corn trade, where exceptionally strict duties exist. The former consideration operates when short periods of collection are provided for perishable goods or for goods which might easily be stolen Some goods must be investigated after delivery with greater care than others where a simple test will suffice, on the other hand, some goods can only be tested while they are already in actual use (*n*) A modern Russian contract for the sale of timber contains the term " This contract is subject to sellers making necessary chartering arrangements for the expedition and sold subject to shipment Any goods not shipped to be cancelled " The term, in effect, gives the seller an option whether or not he desires to perform some of his liabilities, he may refuse to do so with impunity Even in this extreme case the seller may not be guided by selfish motives If counsel's argument in *Hollis Bros. & Co , Ltd* v *White Sea Timber Trust, Ltd.* (*o*) is correct, the Russian Government were endeavouring to develop trade by sea with arctic districts, " but there was only a short navigation season and the trade had to be carried on under great difficulties This was a new trade, and in view of its difficulties the sellers had expressly protected themselves "

It may take a long time before considerations of the kind described in this section find expression in standardized contracts As often as not it will be a decision of the Court which suddenly reveals the lacuna in the protective scheme of a trade This was, for instance, the case with the collision clause dealing with the underwriter's liability to pay in case of a collision between two ships belonging to the same owner (*p*)

(*n*) E Rabel, *Recht des Warenkaufs*, 1936, p 39, Ripert, *La Règle Morale dans les Obligations Civiles*, 2nd ed., 1927, No. 58, p 106

(*o*) (1936), 56 Ll L Rep. 78, 79; 3 All E. R 895, better reported, so far as counsel's argument is concerned, in *Times* Newspaper, November 12th, 1936

(*p*) *Simpson* v. *Thomson* (1877), 3 App Cas. 279 (H L—Sc), *Midland Insurance Co* v. *Smith* (1881), 6 Q B D. at p. 565, had decided that underwriters could not recover. A clause was drafted to meet this case see

Another instance is the purchase agreement in the recent case of *L'Estrange* v. *Graucob, Ltd* (*q*), where Scrutton, L J., pointed out that the exception clause was wider than usual so as to avoid the effect of earlier decisions (*r*)

III.—Politics and the Law.

(1) Having traced the history of standardized contracts and their economic motives, we now proceed to consider on what general foundation within the framework of legal thought the edifice of standardized contracts is built. At this stage it may be well to keep in mind the inherent similarity of standard terms and ordinary terms in contracts Both sets are possible only because they have the sanction of the law which gives the members of the community a certain latitude to shape their lives and relations as they please This latitude is generally described—perhaps somewhat compendiously—as the principle of the freedom of contract It is not superfluous to deal with this principle in this study. Though it is a phenomenon not peculiar to standardized contracts, it has been shown, and it will become still clearer a little later, that standardized terms present the old problem in a more acute form. The legislature and the other law creating organs of the State might consider

---

Chalmers, Marine Insurance Act, p 117, note, Arnould, Marine Insurance, 11th ed , § 795, note, W H Eldridge, Marine Policies, 2nd ed , by H Atkins, 1924, p 155, Sistership clause in the Institute clauses " Should the vessel hereby insured come into collision with or receive salvage from another vessel belonging wholly or in part to the same owners, or under the same management, the assured shall have the same rights under this policy as they would have were the other vessel entirely the property of owners not interested in the vessel hereby insured "

As an example of clauses being altered in consequence of judicial decisions, see *Chippendale* v *Holt* (1895), 1 Com Cas. 197, *per* Mathew, J , and *Street* v. *Royal Exchange Assurance* (1914), 19 Com Cas. 339 (C A). These decisions deal with the re-insurance condition " to pay as may be paid thereon " See also as to the history and meaning of " compromised and/or arranged total loss," Scrutton, L J , in *Gurney* v *Grimmer* (1932), 38 Com Cas. 7, 44 Ll L Rep. 189 (C. A)

(*q*) (1934) 2 K B. 394, 402 (C A)

(*r*) Namely, *Wallis* v. *Pratt*, (1911) A C 394 (H L), *Andrews* v *Singer*, (1934) 1 K B 17 (C. A.), affirming Goddard, J , where conditions and warranties were excluded, but the exclusion only applied to new Singer cars, and the car sold was not a new one within the terms of the agreement

ordinary terms in contracts harmless, but they may and do feel that the regularity with which private contractual law is created by standardized terms constitutes a new problem of some magnitude which should not pass unnoticed. The freedom of contract may be curtailed with regard to standardized contracts and might remain untouched in all other respects For these reasons a short survey of the situation appears to be advisable.

(2) The great German philosopher and lawyer, Rudolf Stammler, wrote in 1923: "The institution of the freedom of contract is known to all laws which are of interest for the present state of affairs" (*s*); and Sir George Jessel, M R, laid down emphatically that "you have this paramount public policy to consider that you are not lightly to interfere with this freedom of contract" (*t*). But what actually is the meaning of freedom of contract? Is it an eternal truth as the natural law in the eighteenth century was believed to be? Or is it liable to changes? It is tempting to consider the conception, together with similar ones, as personal freedom, freedom of speech, and freedom of property Like these, freedom of contract is often elevated to one of the basic rules gaining paramount significance of almost constitutional force This is not the place to weigh the merits and demerits of such procedure It is, however, right to say that this conception is an offspring of the individualistic school of thought, and that it expresses no eternal truth Indeed, the principle has been used in political discussions to justify both liberation and restriction In a stimulating lecture, which was instigated by the Parliamentary debates in 1880 of the Ground Game and the Employers' Liability Acts, Professor T. H Green (*u*) explains how liberals of the generation before fought in the name of freedom for the abolition of old

---

(*s*) "*Alle Rechtsordnungen, die für die heutigen Zustände von Interesse sind, kennen die Einrichtung der Vertragsfreiheit*" *Lehrbuch der Rechtsphilosophie*, 2nd ed, p 318.

(*t*) *Printing and Numerical Registering Co* v *Sampson* (1875), 19 Eq 462, 465.

(*u*) Liberal Legislation and Freedom of Contract, Works edited by R. L Nettleship, vol 3, 1888, p. 365 *et seq*

privileges, and how in his days they were fighting in the name of reform for the restriction of the newly-acquired freedom of contract. He refers to the Factory and Education Acts which were passed by the Parliament elected in 1868 The author believes that the liberal attitude is the right one with regard to freedom of contract in spite of the apparent ambiguity "Our modern legislation," he proceeds (*x*), "with reference to labour and education and health, involving as it does manifold interference with freedom of contract, is justified on the ground that it is the business of the State to maintain the conditions without which a free exercise of the human faculties is impossible" Here we have a specimen of State interference directed against grievances, aimed against inequality, and prompted by the desire to restore equality by letting one group of the community run with a handicap Thus the conception may serve as a basis of different actions (*y*) It appears still more ambiguous if one bears in mind that to a certain extent the business man or concern or cartel, by imposing the most drastic restrictions on their customers or members, do so, consciously or unconsciously, in the name of the proud principle of contractual freedom

(3) Indeed, no reasonable man believes in unrestricted freedom of person, property or contract If the life of the community is to function at all, freedom must not become licence, its use not abuse. Yet, there is one essential difference between the State's attitude in former periods and in modern times Formerly the State was content to remedy certain abuses, to abolish grievances with a view to the restoration of freedom Now the motive has changed. Modern States find it necessary to map out for their subjects particular roads and to prescribe a positive conduct of certain affairs. Where this course has been taken it was not done in the service of any equality principle restricting abuses and leaving the rest to self-regulation, but rather in order to

(*x*) *L.c*, p. 374.
(*y*) In the eighteenth century the legislature even intervened to restrict the sea carrier's liability. See Fletcher, *l c*, p. 175.

ensure that the citizen did exactly what the *civitas* required him to do in the interest of the community as a whole and of its members. In this field the freedom of contract has been virtually abolished The limitations are strongest in totalitarian States like Germany and Italy, where the recent Fascist revolutions could build on a long tradition of State interference and civil service administration (*z*). Some of these restrictions bearing on our problem have been described in the previous section There have, however, of recent years, occurred substantial inroads into the freedom of contract even in England Restrictions of the older type are the Moneylenders Act, 1927, making certain contracts unenforceable, or the Trade Disputes and Trade Unions Act, 1927, sect 6 of which avoided certain contracts; also sect. 27 of the Patents and Designs Acts, 1919—1932, providing for compulsory licences in case of an abuse of a monopoly, belongs to this class A mild direction, but still no command, in spite of the emergency created by the war, is sect 39 of the Finance Act, 1918, authorizing trustees to invest in War Loan though expressly forbidden by the trust instrument (*a*)

Another group of statutes permits, under varying safeguards, the breach of long agreements so as to give effect to the policy of the Act Examples are the Celluloid and Cinematograph Film Act, 1922, s 8, and the Shops Act, 1934, sect 11 providing for the alteration of repair clauses in leases so as to enable occupiers to improve their premises according to the general tenor of the respective statutes, to the same set belongs sect 102 of the Housing Act, 1925, where provision is made for the grant of a new lease, and sect. 84 of the Law of Property Act, 1925, which enables the discharge of restrictive covenants in leases (*b*). Certain clauses are declared void, not simply because abuses had occurred, but because the legislature had initiated positive

(*z*) J. Schumpeter, *Epochen der Dogmen-und Methodengeschichte, Grundriss der Sozialökonomik, Abt.*, I , 1914, pp. 29 *et seq* , 33 *et seq.*, 36.

(*a*) *Re Head* (1919), 88 L. J Ch 236

(*b*) *Re Lancaster Gate*, (1933) Ch 419

schemes, in the Agricultural Holdings Act, 1923, s. 50, Agricultural Holdings (Scotland) Act, 1923, s. 45, and the Unemployment Insurance Act, 1935, s 9 On the other hand, positive administrative rules for future contracts are envisaged by the Poor Law Act, 1927, s 241 (1), the Cotton Manufacturing Industry (Temporary Provisions) Act, 1934, s. 3, and, especially interesting for our purposes, the Gas Undertakings Act, 1934, s 7 (1) (b), amending sect 13 of the Gasworks Clauses Act, 1847, which ensures an elastic standardization of gas contracts Finally, the Agricultural Marketing Acts (*c*) and the Mining Act may be mentioned

Apart from the restrictions referred to, freedom of contract remains unimpaired The principle has even been incorporated in the Polish Law of Obligations of October 27th, 1933, art 55 (*d*); it is surprising that a modern code should have any use for the old institution which of late has suffered a good many setbacks

(4) The juristic terms which express the extent of freedom of contract are the old Roman ones of *jus cogens* and *jus dispositivum* The more liberal a law the more *jus dispositivum*, and the more totalitarian the wider is the province of the *jus cogens*. It is not always easy to determine in practice to which set of provisions a particular rule belongs. Modern statutes tend to say expressly what sections may not be contracted out There is also this guiding rule that in most laws—except probably in Russian law—there exists a presumption in favour of the *jus dispositivum*. In spite of that rule it is often difficult, especially in the Continental Codes, to be sure how an individual

(*c*) Note sect 17 (2) of the Act of 1933, which authorizes contracts for the benefit of third parties, namely, the Board

(*d*) See Rukser, Z A I P R , vol 8, p 353 It should be noted that this enactment can only be called modern with some reserve. Since the different parts of Poland prior to the creation of the Polish State in 1917 belonged to different nations, their law prevailed even after the State had been founded The legislator now had the difficult task of unifying the law of obligations. As also other sources were used, the new Polish Code constitutes a blend of the German, Austrian, Swiss, and French Codes, the German Code being of particular importance

section should be classified. Based on the ideas of liberalism, the legislator was loth to tie the judge to a fixed interpretation so as to allow of variation in future. The determination of these questions was left to the judges' interpretation and to the scientific work of legal literature (*e*). This view is reflected by German literature dealing with the law of the Civil Code (*f*). The adoption of the method follows the tradition of the Pandectists (*g*). The same principle applies to English law where the great bulk of the law of obligations has not yet been cast into statutes It is common knowledge that at least in contractual law every provision was and partly is oustable if there are no special reasons indicating their compulsory nature. Exactly the opposite appears to be the case in Soviet Russia where private autonomy is strongly reduced in comparison with other legislations (*h*). The Western European rule is certainly reversed in Soviet Maritime Law. The Russian Maritime Code follows the maxim that every provision is of a compulsory nature unless the contrary is expressly conceded (*i*)

A similar development might occur in Germany. Dr. Heinrich Lange, a distinguished lawyer of the younger generation, claims that at least all provisions of the law relating to landlord and tenant, and master and servant, ought to be compulsory (*k*), and as to the former the actual development has been on those lines Dr. Lange stands for the idea of duty, and consequently the extinction of the right to vary hitherto non-compulsory provisions of the Civil Code (p. 17) He finally claims the right of the law of the State to break the freedom of the parties to a contract, and to mould what they wanted according to their wishes (p 18).

(*e*) *Motive zum Buergerlichen Gesetzbuch*, vol 1, p. 17, *Protokolle*, vol 1, p. 281

(*f*) v Tuhr, *Allgemeiner Teil des Buergerlichen Gesetzbuchs*, vol. 1, p. 28, Enneccerus, *Allgemeiner Teil*, § 45, IV.

(*g*) Regelsberger, *Pandekten*, vol 1, p. 130

(*h*) A. Halpern, *Traité du Droit Civil et Commercial des Soviets*, vol. 2, 1930, p 4

(*i*) A D. Keylin, *Zeitschrift fuer Ostrecht*, vol 1, 1927, p 1 *et seq*

(*k*) *Liberalismus, Nationalsozialismus und Buergerliches Recht*, 1933, p. 15.

Thus there are several kinds of State interference into the freedom of contract. The situation changes constantly, and there can be no doubt that every change means a new setback to the idea; but as long as freedom of contract remains the paramount principle, and the inroads form but exceptions, there will always be scope for the existence and growth of general terms and conditions in standardized contracts.

Chapter II.

THE APPLICATION OF "CONDITIONS" IN STANDARDIZED CONTRACTS.

I.—The Doctrine.

(1) The application of "conditions" constitutes the crucial question German authors dealing with the subject sometimes foreshadow the application problem by a thorough investigation of the theories of law, discussing the nature of law and the nature of conditions in contracts (*a*) In the present study it was thought proper to leave all these questions out at this stage and to discuss the nature of conditions later. Before that question can be solved the sources ought to speak for themselves, and conclusions of a general kind can then be drawn more usefully, but it will be convenient to start with the working hypothesis that standard conditions are a species of contractual terms constituting the *lex contractus*.

(2) Within the history of legal doctrine standard terms can look back on a chequered if short career. English legal doctrine almost omits them and the most recent text-book on the law of contract, written by so eminent a scholar as the late Sir Frederick Pollock (*b*), emphasises that in dealing with this form of contractual terms "we have only to apply the elementary rules of offer and acceptance." It is true that English judges have often given considerable thought to the new phenomenon. This is all the more important as English judgments are far more elaborate than those of their Continental brethren. The

(*a*) This is particularly true of the excellent book by Raiser, to which frequent reference will be made in this study

(*b*) 10th ed , 1936, p 51, see also p. 49, note (*e*).

fact that English judges are to a large extent not in the happy position of being able to avail themselves of conveniently arranged sections of a code forces them to lay down much more of the law than would seem necessary in the eyes of Continental lawyers. Jurisprudence gains by this method, and English judgments rightly command far greater respect than those abroad irrespective of their formal importance as precedents. Indeed, in some respects English judgments hold part of the field which is covered in other countries by legal literature. At the same time this method, it is submitted, entails certain disadvantages. Broad though the platform may be on which an English judge bases his decision, it must of necessity be limited by the needs of the case in hand. Such procedure restricts the scope of enquiry. Here lie probably the reasons why even English judgments have so far not arrived at a comprehensive theory of standardized terms in contracts, though the following pages will show that in fact some striking—some may even think startling—departures from the general law of contract have been made when standard terms came up for consideration.

(3) As in many other instances, French legal doctrine has won the day also in the field of the present enquiry. We have already noticed that Pothier drew attention to some alarming features of standardized terms. Thus it is perhaps not surprising that it was a Frenchman, Raymond Saleilles, who for the first time in legal history distinguished standard and ordinary contracts. The occasion, too, was noteworthy. He did so in a little book, where he dealt with the sections of the then brand new German Civil Code relating to the intention of the parties to a contract. Saleilles coins the term *contrats d'adhésion;* his words merit quotation in full (c): "*Sans doute, il y a contrats et contrats; et nous sommes loin dans la réalité de cette unité de type contractuel que suppose de droit. Il faudra bien, tot ou tard, que le droit s'incline devant les nuances et les divergences*

(c) *De la Déclaration de Volonté*, 1901, p. 229, art. 89.

que les rapports sociaux ont fait surgir. Il y a de prétendus contrats qui n'ont du contrat que de nom, et dont la construction juridique reste à faire; pour lesquels, en tous cas, les règles d'interprétation individuelle qui viennent d'être décrites devraient subir, sans doute d'importantes modifications; ne serait-ce que pour ce que l'on pourrait appeler, faute de mieux, les contrats d'adhésion, dans lesquels il y a la prédominance exclusive d'une seule volonté, agissant comme volonté unilatérale, qui dicte sa loi, non plus a un individu, mais a une collectivité indéterminée, et qui s'engage déjà par avance, unilatéralement, sauf adhésion de ceux qui voudront accepter la loi du contrat, et s'emparer de cet engagement déjà créé sur soi-même C'est le cas de tous les contrats de travail dans la grande industrie, des contrats de transport avec les grandes compagnies de chemin de fer, et de tous ces contrats qui revêtent comme un caractère de loi collective et qui, les Romains le disaient déjà, se rapprocheraient beaucoup plus de la lex que de l'accord des volontés."

These words had a stimulating effect on legal thought, be it only by the ensuing almost universal rejection of their tendency. Ripert criticizes the term *contrat d'adhésion* as too vague (*d*), though he admits there is some truth in it. According to him, the adherent can really not be said to have intended all the stipulations of a standardized contract. The learned author calls it "*une mauvaise plaisanterie de lui dire: tu as voulu,*" if the alternative is never to insure, never to travel, or never to use gas, water, or electricity (*e*). Still, most modern writers only accept the term as a picturesque phrase, convenient to embrace with one word such contracts as contracts of carriage and insurance, industrial labour agreements, and contracts for the supply of gas, water and electricity, agreements between publishers and their retailers, and the renting of offices and flats; but apart from that no particular value is attributed to the

(*d*) *La Règle Morale dans les Obligations Civiles*, 2nd ed. No. 55, p. 101; so, too, Josserand, *Cours de Droit Civil Positif Français*, vol. 2, 1930, No. 32, who would prefer the term *contrats par adhésion*.

(*e*) *L.c.*, No. 56, p. 103.

term (*f*). According to the writers, the judge can and should only interfere if a monopoly is abused; but he cannot generally be called upon to decide the degree of economic strength of the parties (*g*). Besides, if the adherent is badly treated it is, according to Ripert (*h*), not by reason of inequality of the parties, but because one of them has abused his position. The real help must come from the politician and legislator

These almost universal criticisms of Saleilles' theory are likely to obscure their lasting effect. The material problems have been thought about in France more than anywhere else, and everybody is conscious of the dangers and on the alert. Even the Court of Cassation, which professedly treats equally *contrats d'adhésion* and ordinary contracts, is usually quick to interfere with a standardized term Moreover, the pioneer work of legal theory has opened the eyes of French lawyers to the needs of business practice, and has made them familiar with the changed nature of consent in modern business contracts. Josserand (*i*) recognizes that the Roman *stipulatio* no longer reigns unchallenged. In modern law an equality in the eye of the law has taken the place of economic equality. Thus Saleilles did not coin his term in vain. In spite of the rejection he suffered, he has supplied more than a convenient comprehensive word. It is due to him that French law takes a leading part in the modern world-wide development of the law of contract. The situation under French law may be summarized thus: In suitable cases less evidence is required to prove that standardized terms have become the *lex contractus* than would be the case with regard to terms in single contracts; on the other hand, the Courts are more inclined to annul one of several standardized

(*f*) *E.g.*, Planiol and Ripert, *Traité Pratique de Droit Civil*, vol 6, p 15, s. 9, Colin and Capitant, *Cours Elémentaire de Droit Civil*, vol 2, 4th ed , 1924, p. 258, who would like to see the articles of association of limited companies included in this class, *René Démogue, Traité des Obligations en Général*, vol 2, 1923, Nos. 616 *et seq.*, 631, Baudry-Lacantinerie, *Précis de Droit Civil*, 13th ed. by Paul Guyot, vol 2, 1925, p 13 *et seq*

(*g*) Ripert, *Règle Morale*, No. 58.

(*h*) *Ibid.*, No 59.

(*i*) *L.c.*, No. 532.

terms than they are if the validity of a term in a non-standardized contract is in issue.

(4) The theory of the *contrats d'adhésion* has had an effect on South-American (*k*), and particularly on German, legal doctrine, though with regard to Germany some qualification should be made German Courts had recognized the peculiarity of standardized contracts long before writers seized upon the subject After the War some smaller studies were published which, however, made no reference to Saleilles. Indeed, most of these books were of little scientific value. They were written, as was unfortunately also the case in some other fields of practical interest, by legal advisers of undertakings and concerns, or by other persons whose purpose was more an argument than a discussion. Not until Dr. Raiser's book (*l*) do we find a really scholarly treatment of the subject. This learned author, who otherwise restricts his studies to German law, is obviously influenced by Saleilles and his followers and critics. He points out that (*m*) the "intention of the parties" has changed in various periods He emphasizes that the psychological element must not be over-estimated Not a psychological but a juristic standard is applicable. "In the province of mass contracts," Dr. Raiser continues (*n*), "it is just the psychological element of the declaration of intention which—thus comparable to the primitive law—is repressed and depreciated. There is, however, this difference that to-day the bargain is no longer made by solemn, symbolic acts, but by informal, typical acts and methods of conduct which have become meaningless by mass use, and which in business are regarded as declarations of intention and are interpreted in a typical sense. A party's intention to bargain is deduced from

(*k*) Bustamante, *Autaquia Personal*, pp 139, 140, a book not available to the writer According to Lorenzen, 4 Tulane Law Rev. 518, note 104 (1930), the author classifies in this category, *inter alia*, bills of lading and the issue of shares and bonds payable to bearer, and he characterizes them as being uniform in character, and are offered by one party to the public in general, a definition which, it is respectfully submitted, is not beyond criticism.

(*l*) *Allgemeine Geschäftsbedingungen*, 1936.

(*m*) *L.c.*, p. 147 *et seq.* (*n*) *L.c.*, p. 148.

its conduct; its most important own function is the negative one, namely, in a typical case to exclude the usual consequences of typical acts in particular, or afterwards to rescind the same."

These observations are certainly correct, but in one respect a criticism may be allowed. It is very well to say that modern business calls for a revision of old conceptions, which, though time-honoured, have outlived their usefulness. Likewise, there is no cause of complaint that the law recognizes these needs. However, the problem which has been created by the spread of bargains made in common form is a twofold one If exporters and importers contract with each other, or wholesalers and retailers, or sea-carriers with merchants, or insurers with business men or with re-insurers, the law may take account of modern business practices more readily than in case of dealings between business men and private persons. A distinction ought to be made between these cases, unless an authority higher than business men decrees rules of conduct to the citizens. This, however, will be dealt with in more detail at the end of this study.

(5) In other countries there is less of interest for our problem. One should not be misled by the fact that in Italy *l'adhesione* is used for acceptance in general without conveying any special meaning (*o*). In that country not only the contracts with transport and public utility undertakings, but those also with hotels, theatres, &c., the *tariffe*, have attracted the lawyers' attention. The well-known commercial lawyer, Cesare Vivante, discusses and rejects the view, advanced by earlier writers (*p*), that such agreements did not partake of the nature of contracts proper. It should be noted that the majority of those terms appears to be statutory. For Vivante points out how swiftly the legislature worked in those cases. The terms were necessary, inasmuch as business is in the habit of working so promptly that it is only possible to carry on if everything moves with " an almost

(*o*) R. de Ruggiero, *Istituzioni di Diritto Civile*, 3rd ed., vol. 2, 1923, p. 246; the author never mentions our problem

(*p*) *Trattato di Diritto Commerciale*, vol. 4, 1929, No. 2037.

mechanical precision." In spite of this the actual bargain has to be made by a *consensus* of the parties; a contract is necessary to set the machine in motion. The same view was held with regard to Swiss law by the late Professor von Tuhr in his standard work on the Law of Obligations (*q*).

II.—The Law.

(a) *Express Consent.*

(1) It is the undoubted rule of law, uniform throughout the world, that no contract is formed without the consent of the parties. The rule governs single contracts as well as contracts made in common form. In either case the parties have to agree upon all terms of the contract, either expressly or by conduct.

First, as to consent *expressis verbis*. Printed conditions are, *inter alia*, issued to facilitate trading, and to exclude protracted discussion. Therefore, as a rule, the express consent cannot mean that the customer is entirely familiar with every one of the printed conditions. Such consent will only indicate that the party expressly consented to the application of the conditions as a whole. The actual knowledge of them is in most cases irrelevant. How is this express consent declared when standardized contracts are concerned ?

(2) In a large number of cases the person or undertaking issuing the common form requests the customer to sign the contract containing the printed conditions. In most of them the person executing his signature will either not read or not comprehend the meaning of the individual clauses. But the law generally deems such signature sufficient proof of express (!) consent to all printed clauses. A symbol is taken for the fact just as in primitive times. Thus in *L'Estrange* v. *Graucob, Ltd.* (*r*), the plaintiff purchased an automatic slot machine. After delivery it turned out to be defective, and the plaintiff

(*q*) *Allgemeiner Teil des Schweizerischen Obligationenrechts*, vol 1, p 121
(*r*) (1934) 2 K B. 394 (C A), see 51 L. Q R 275, Lord Wright, Some Developments in Commercial Law, Birmingham Presidential Address to the Holdsworth Club, 1936, p. 20.

sued the defendant for breach of contract. This had been signed by the plaintiff, and contained a clause to the effect that the agreement embraced "all the terms and conditions under which I agree to purchase the machine specified above, and any express or implied condition, statement, or warranty, statutory or otherwise, not stated herein is hereby excluded" It was held that the clause applied and that the plaintiff had no cause of action. She had signed the document and "not having been induced to do so by any fraud or misrepresentation, cannot be heard to say that she is not bound by the terms of the document because she has not read them" (*s*) It had been argued that the unusual form of the contract and the small print of its material part prevented the application of terms to which the plaintiff had not in fact consented, but though Maugham, L J., as he then was, regretted these circumstances he did not dissent from Scrutton, L J 's judgment (*t*) The position would have been different, and the plaintiff's signature would not have availed the defendant, had there been anything actually misleading in the get-up of the contract. *Roe* v *R. A Naylor, Ltd.* (*u*) furnishes an example of this type There the plaintiff had orally agreed to buy timber from the defendants, who shortly afterwards sent him a sold note. A clause was printed in small type, sideways, in the margin of the note, providing that "goods are sold subject to their being on hand and at liberty when the order reaches the head office." When the time for delivery arrived a portion of the goods was not available. In spite of the clause the plaintiff's action for damages was successful, for the plaintiff was misled, he never consented to the clause orally, and later did not see it. Scrutton, L.J., explained (*x*) why he held the plaintiff to have been misled: "You get a consecutive document purporting to be a contract, reading consecutively and intelligently from beginning to end, without reference to any other printed clause, and the question, in my view, is one of fact:

(*s*) Scrutton, L.J , at p. 404.
(*t*) At p. 407, following Mellish, L J , in *Parker* v *South Eastern Railway Co.* (1877), 2 C. P. D. 416, 421
(*u*) (1918), 119 L T 359 (C A). (*x*) At p. 363.

Have the defendants taken reasonable care . . . to bring to the notice of the other party that . . . another clause on this paper is part of the document ? " This the defendants had not done, though they ought to have been particularly careful in this case where there was an oral contract followed by a document with clauses not orally agreed upon before As the learned County Court judge found (*y*), " a business man acting with ordinary care would be excused " (*z*) Finally, a person signing a contract without being able to read it is not bound by unreasonable terms (*a*)

By way of a summary we may say that only in exceptional cases will the Court allow a person who signed a contract containing printed conditions to raise the defence that the knowledge of one or more clauses was not brought home to him (*b*).

(3) The same position obtains abroad. In **France,** where the problem was mooted particularly with reference to insurance conditions, it is the universal opinion of the Courts and the writers that the signature of a document indicates consent unless very special circumstances prevail (*c*) Apart from insurance

(*y*) Quoted by Swinfen Eady, M R , at p 360

(*z*) Prior to sect 35 (2) of the Companies Act, 1929, " waiver clauses in a prospectus of a limited company were valid, but in a case where a waiver clause was tricky and " printed in small type so as to escape attention," it was held that the clause was " void," *i e* , not applicable See *Greenwood* v. *Leather Shod Wheel Co* , (1900) 1 Ch. 421 (C A)

(*a*) See *The Luna*, (1920) P 22, *per* Hill, J , where the master of a Dutch vessel signed a towage contract written in English whereby the crew of the tug were made servants of the tow, and the tug-owners entitled to be indemnified by the owners of the tow This clause was held reasonable, though the master could not read it owing to his deficient knowledge of English. The owner of the tow was held bound by the clause.

(*b*) The proposition is restated in the American Law Institute's Restatement of the Law of Contract, § 23 a " an offeree, knowing that an offer has been made to him, but not knowing all its terms, can accept whatever terms it contains. For example, where an offer is contained in a writing the offeree may, without reading the writing, accept it and bind himself without knowing its terms . So in many cases usages of business or of local exchanges are annexed as terms to an offer, and even though the acceptor is not aware of these usages which qualify or vary the meaning the offer would otherwise have, an acceptance will bind him to a contract with those terms included "

(*c*) *Cour de Cassation Civile*, February 1st, 1853, Dalloz, 53 1.77; Sirey, 55.1 1852; Planiol and Ripert, *l c* , vol 11, p. 587, with decisions quoted; cp p. 626, and art. 9 of the Insurance Act, 1930.

cases the French Courts have been called upon to decide whether limitation of liability clauses apply in a particular case. The Courts have clearly established that such conditions always apply where the party against whom the clause operates has signed a document. Such clause will not even be ousted if the party is illiterate or incapable of understanding its meaning (*d*).

Substantially the same may be said of **Italy,** where it was decided in a recent case that the signature of an order form does not testify the assent of the signer to a clause printed in a concealed part of the form. In that case a clause containing a proviso providing for the jurisdiction of a specific Court in case of litigation, which was printed amid advertisements, was declared not to be binding on the person giving the order if he proved that he did not actually read the clause (*e*)

German law comes to a similar conclusion, but there a third possibility is open to the customer (*f*) He can not only dispute the applicability of the clause or clauses, or contend their invalidity, but he is also entitled, in very exceptional cases, to avoid the contract by reason of his mistake about the contents of a certain clause, under sect. 119 (1) of the German Civil Code. This paragraph, in Dr. Schuster's translation (*g*), reads as follows:—"Any person who, when declaring his intention, was under a mistake as to the tenor of his declaration, and did not intend to make a declaration of such tenor, may avoid such declaration if it may be assumed that he would not have made it if he had known the true facts and given reasonable consideration to the matter." The plaintiff's burden of proof is no light one. Avoidance is impossible where the customer had no opinion at all about the contents of the clauses which he omitted to read. On the other hand, even a negligent omission

(*d*) Planiol and Ripert, *l c.* vol. 6, p. 564 *et seq.* Cp. the English *non est factum* decisions.

(*e*) Italian Court of Cassation, February 19th, 1931, *Rivista di Diritto Privato*, 1931, p. 43, Z. A. I. P. R., 1933, p. 685, *Giur. it.* 574; Z. A. I. P. R , 1933, p 680.

(*f*) Raiser, *l.c.*, pp. 185, 245 *et seq.*

(*g*) Principles of German Civil Law, 1907, p 95 See there, too, on the difference between German and English law of mistake, p. 93 *et seq.*

to read the conditions does not by itself disentitle the customer to avoid the contract. Avoidance is, however, only permissible "if it is certain that the customer would not have made the contract had he known the term. Thus immaterial variations of the usual scheme or collateral points, which would not have induced the customer to let the negotiations break down, will also later on exclude avoidance. However, sect. 119 (1) fails even in case of material terms, of which the customer had not thought, and to which he would hardly have consented voluntarily, if it is certain that owing to the undertaker's economic power the customer was in a dilemma which would in no case (or not without serious disadvantage) have protected him against this or a similar term. In this case help can only be given through the stronger weapon of invalidity by reason of an abuse of such economic power" (*h*). For the convenience of English lawyers it should be made clear that in German law such mistake short of *dissensus* does not make the contract void, but only voidable, the person entitled to avoidance being liable to indemnify (not to pay damages (!) to) the other party (*i*).

(4) Returning to **English** law, two anomalous cases must be noticed in passing. It may happen that a clause applies though, contrary to the usual course, the contract has not been signed In *Hall* v *North Eastern Railway Co.* (*k*) a ticket for the transport of sheep was issued by the defendant company. It contained this clause: "If it is desired that any drover, or person accompanying the live stock, shall be allowed to travel in the same train as the live stock without paying a fare, he must travel at his own risk, and must either sign this in token that he agrees to travel at his own risk, or he must pay fare as a passenger: I agree to travel at my own risk without paying any fare and accept a free pass subject to the following conditions, viz. —. . . That the holder . . . exonerates the company from

(*h*) Raiser, *l c*, p 248

(*i*) The difference between damages and indemnity in English law of misrepresentation has been explained in *Whittington* v. *Seale-Hayne* (1900), 82 L T 49

(*k*) (1875), L R 10 Q. B 437

all responsibility for injury or loss to himself howsoever occasioned on the journey for which it is issued or used.—Witness ——. Signed ——, drover." The plaintiff accompanied the sheep, but omitted to sign the document. He was injured, and the action for damages was dismissed, the exception clause having been held to apply. Blackburn, J., as he then was, expressed himself, perhaps somewhat summarily, as follows (*l*):—"It is true that the plaintiff did not sign the ticket, and he was not asked to do so, but he travelled without paying any fare, and he must be taken to be in the same position as if he had signed it." The case has never been expressly followed or overruled, and it is open to doubt whether it represents good law. To-day the decision would probably go the other way, unless very special circumstances prevailed, *e g*, that the drover was in the habit of making similar journeys, must be taken to know, and to have consented to, the term, and intentionally or negligently failed to sign

(5) The distribution of mercantile matters among Courts of common law and equity had produced an antinomy which seems a little curious if one looks at private law as a whole It was mentioned above that some foreign laws comprised in the group of standardized contracts agreements to take shares and bonds. Indeed it cannot be denied that there is a strong resemblance both of judicial construction and of the conflicting interests of the parties in both institutions, though we do not close our eyes to the fact that in the share subscription cases (but not in those relating to bonds) the customer becomes a member of an association. It deserves at least a passing notice that if a person subscribes for shares in a limited company and fails to inspect the statement in lieu of prospectus he has no right to rescind the contract if the statement contains any innocent misrepresentations (*m*). We admit that no authority can be

(*l*) At p. 441

(*m*) This follows from the remarks of Warrington, J., *In re Blair Open Hearth Furnace Co., Ltd*, (1914) 1 Ch. 390, 401; affirmed by the Court of Appeal, p. 402 *et seq*.

produced for the proposition that in common law contracts a customer was not entitled to avail himself of a right conferred on him by a term which he had failed to read; but it is submitted that to hold so would be contrary to the spirit of the current case law. In equity, however, the position is different. A person can only found a claim on a right of which he was aware. This different treatment can be explained by indicating that a Court of equity is a Court of conscience and that it is unconscionable to rely on a clause though one entered into the agreement without knowing it. However, it seems unfortunate that the uniformity of essentially similar business transactions should receive a different treatment at the hands of two different Courts of equal rank. Besides, it is submitted, it would also be fair to give a subscriber the benefit of a contract the terms of which he has not seen, considering that, in spite of this fact, he is bound by its provisions so far as duties are imposed on him.

(6) A number of **German** decisions deal with cases where business firms send catalogues to their customers. The catalogues often contain one or two pages with printed conditions providing, *inter alia*, for a specific Court to be competent in case of dispute, and for payments to be made in a certain manner. If the customer thereupon orders goods without referring to the conditions, the latter do not become the *lex contractus*. For the sending of a catalogue in itself does not constitute an offer, but only an invitation to treat (*n*). The customer's offer must contain the terms of the contemplated bargain, and must be susceptible of an unqualified acceptance. If the offer does not refer to the conditions incorporated in the invitation to treat, the offer will be read together with the general law, provided there are no other circumstances which might bring about the opposite effect

(*n*) This will usually be the true position see Raiser, *l c.*, pp 110, 112, 182 *et seq* , but the case would be different if the catalogue or announcement constituted continuous offers by the persons issuing them as, *e g* , in the English case, *Carlill* v *Carbolic Smoke Ball Co , Ltd* , (1892) 2 Q B 484, (1893) 1 Q. B. 256 (C A) In **Belgium** there is evidence for the proposition that persons issuing catalogues, &c make continuous offers so that acceptance " constitutes immediately the legal bond "· Waleffe, *Répertoire Général de la Jurisprudence Belge, Obligations*, No 77, December 15th, 1909.

If, conversely, reference is made in the customer's offer to the said conditions, then the latter become the law binding the parties.

Suppose, however, there is a form attached to the catalogue on which the customer is requested to make his orders, if any, and such form contains a printed clause under which the conditions as set out in the catalogue shall be binding upon the parties. In such case the customer will generally be deemed to have expressly inserted the conditions in his offer; and only in cases of gross unfairness, as, *e.g.*, in *Roe* v. *Naylor* or the Italian case quoted above (*o*), the Court might be inclined to hear the customer's defence that he did not read and could not be expected to find the conditions in the catalogue.

Again, suppose the customer, for one reason or other, makes his orders on a sheet of paper other than the form attached to the catalogue or orally, in both cases without reference to the conditions, then no express agreement with the conditions has occurred, and the latter will usually be of no avail; for the offer coming from the customer does not mention the conditions as contemplated terms of the offer and of the subsequent contract.

Finally, take the following case:—The conditions in the catalogue contain the clause that no order will be accepted from a customer, other than one written on the firm's printed forms. This case often happens when the business of the firm is so large that expediency requires only one type of paper being used in the files. If in spite of this clause the firm entertains an offer which does not comply with the requested form, there will again be no express agreement between the parties with regard to the conditions, and, in the absence of other incidents, the conditions will fail to become the *lex contractus*.

Let this be quite clear. In this paragraph only cases of express agreement to printed conditions were dealt with. Where, therefore, no such agreement was said to exist, such conditions may not be altogether excluded There might be a tacit agree-

(*o*) Above, pp. 42, 44.

ment, or the conditions might have binding force as usage, independently of the intention of the parties.

(b) *Tacit Agreement to Printed Conditions.*

(1) Innumerable contracts are made where the customer never expressly assents to general conditions issued by the other party This happens in various trades, and according to the custom of such trade the tacit acceptance of general conditions by the customer occurs in manifold forms Customers may be acquainted with a firm's standard terms prior to any individual contract being negotiated, or they may hear of them afterwards and omit to remonstrate Receipts, sold-notes, policies of insurance, charter-parties, bills of lading, tickets for sea, rail, car, and air journeys contain conditions, as do bills and public notices, and in each case the standard terms are brought home to the customer at a different moment of the negotiations, whereby no distinction is made between oral and written contracts.

How should the lawyer classify this multitude of instances ? At first sight it might seem fair to distinguish between contracts made summarily and agreements concluded after protracted bargaining, so that the degree of deliberation may be taken into account which the customer was afforded before he finally bound himself to the standard terms However, this does not appear to be the right course Too many transitions would blur the line between the two extremes

As some sort of classification is necessary in order to present the facts in an orderly fashion, it is proposed to proceed by first dealing with general conditions communicated independently of future contracts, and then to treat the various cases where the customer becomes aware of them on or after completion. The latter class will be discussed by reviewing the trades in which these phenomena occur.

(2) In view of the legal position in England and abroad, which can only be gauged by working through an enormous mass of case law, it is thought convenient to enquire how the

only statute dealing with the problem generally, as far as can be seen, approaches it. Reference will therefore be made to Art 71 of the **Polish** Law of Obligations of October 27th, 1933 Its contents are thus reproduced by Rukser (*p*) "General conditions of one party bind the other one only if they are either given to the other party when the contract is made, or the use of general conditions is usual in the circumstances of the case, or the other party was in a position to acquaint itself easily with their contents, and business regulations are usual in the circumstances in question" Thus, Polish law distinguishes between three cases The difference between the second and the third alternative is apparently to this effect In the second alternative the personal relations between the parties prior to the disputed contract make it clear that the party not issuing the forms had to reckon with them, on the other hand, the third alternative envisages big undertakings which customarily act according to regulations to which the customer has an easy access. Generally speaking, the Polish Code corresponds with the law of other countries, and the differences, it will be seen, are due rather to the inequality of general principles of law than to any disagreement on the main question, though occasionally Courts may disagree also as to the purport of one of the principal rules.

(3) A recent **English** case furnished the opportunity for a full dress argument on the effect of conditions known to the customer prior to the individual contract forming the subject-matter in dispute In *The Kite* (*q*), a goods owner by an oral contract deposited his goods in a warehouse, and later ordered the latter to remove them to another warehouse; this was done by sub-contracts between the first warehouse and a lighterers' firm, and between the latter and tug-owners. The goods were damaged in transit, and the goods-owner sued the tug-owners for damages. The principal question decided was the alleged negligence of the tug's captain. As happens so often,

(*p*) Z A. I P. R , vol. 8, p. 355. (*q*) (1933) P. 154.

the really interesting point was only decided as an *obiter dictum* However, Langton, J 's judgment on this point was so elaborate that it deserves the full weight of a persuasive if not a decisive authority. The learned judge found that there existed a very long course of dealings between the goods-owner and the warehouse, and that the former was well aware of the latter's limitation of liability clause " There was no written contract, but it is not denied on behalf of the plaintiffs that the Bull Wharf Company have been accustomed to do their business for a long term of years under the conditions of a certain clause " (*r*) The clause is, therefore, held to be part of the oral contract. It remains to be seen whether this *dictum* will commend itself to judges in future (*s*), though the result appears to be eminently satisfactory The fact that the plaintiff made a contract with the wharfinger, having full knowledge of the latter's usual conditions, constitutes an assent to be bound by them (*t*)

(4) In **France** this seems to be the accepted law. Perreau (*u*) quotes a decision of the Lyon Court, dated December 1st, 1922, which was apparently never overruled There it was laid down that, in judging whether a particular clause had been tacitly agreed on, the course of dealing between the parties was of the utmost importance If a business man habitually has an exemption of liability clause or a clause limiting his liability for warranties printed on his letters, a customer, who has dealt with such business man for some time, is bound by such clause even though no correspondence took place in the individual case

(5) **German** cases have given the *Reichsgericht* the opportunity to discuss the problem on a somewhat wider platform The Court laid down (*x*) that if a business man sends his general

(*r*) *Per* Langton, J., at p 162, a new custom would have been treated differently see p 177

(*s*) The judgment has been criticised on another point by Professor R. S. T. Chorley in 50 L. Q R 8

(*t*) Incidentally this decision conforms with the second alternative of art 71 of the Polish Law of Obligations, above, p. 50

(*u*) *Rev Trim*, vol 26, p 314, *Gazette du Palais*, 1923, 2 469.

(*x*) In a decision dated May 22nd, 1931, RGZ 133, 45

conditions to another business firm and on that occasion makes it clear that, should the firm receiving the conditions choose to contract with the sender of the conditions, all future transactions should be governed by them, provided always the receiving firm does not make any reservations, or raises no objections when starting business intercourse This decision represents the leading opinion on the subject (*y*). It is based on the reflection that if one merchant communicates to another merchant the terms upon which he is prepared to trade with the latter, this must be regarded as sufficient to bring home to the latter the terms of the prospective contracts A business man is expected to know that if he accepts the offer the conditions thus communicated to him beforehand will become binding, his conduct will be taken as tacit agreement to them. Neither does the *Reichsgericht* require any special reference to the conditions when the order is made This, however, does not permit of generalisation The principle as laid down by the German Supreme Court is only reasonable if applied betweeen merchant and merchant If, as pointed out above, a firm sends catalogues to customers, and the latter thereupon orders goods without reference to the conditions inserted in the catalogue, the common law alone will usually be relevant; for there is no express consent of the parties with regard to the conditions in the catalogue, and it will largely depend on the facts of the individual case whether a tacit agreement may be assumed to prevail If it is proved that the customer knew the conditions and made an order without reference, but also without objection to them, a tacit agreement exists. Other considerations apply where a business firm and a commercially lay customer deal with each other In that case no general inference or presumption may be drawn from the customer's conduct; here not everything is reasonable and just because it is so between two business men

---

(*y*) Staub and Gadow, *Kommentar zum Handelsgesetzbuch*, § 346, notes 17 and 17a, Rabel, *Recht des Warenkaufs*, 1936, p 100, U Michel, *Die Allgemeinen Geschaftsbedingungen*, 1932, p. 14 *et seq.*

(6) At this point it will be convenient to consider a problem which often arises between business men, and which has been dealt with with regard to the relations of German importers and other wholesale traders (*z*). Suppose A communicates his conditions together with an offer to B ; B accepts the offer, and simultaneously sends A his conditions which he declares to be the basis of the bargain According to the general law this conduct of B. amounts to a rejection of A 's offer together with a new offer made by B Professor Rabel, on the other hand, points out (*a*) that business men and lawyers agree that in such a case a contract has been concluded and that the parties are *ad idem* , but he thinks it fairer to discard both sets of conditions and to let the general law prevail, as none of the parties has succeeded in making his standard terms the *lex contractus*. Probably no general answer can be given to this question, there is much to be said for Professor Rabel's solution, which effects a compromise favouring none of the parties The other solution which is popular among Hamburg business men has the advantage of being more in accordance with the basic rules of offer and acceptance, though it may result in the success of the party with the greater insistence and the loudest voice

Insurance Conditions.

(7) We now pass to those cases where the customer has the opportunity to acquaint himself with the general conditions either during the negotiations or after the contract has been completed Contracts of insurance deserve a separate discussion. Within this group marine insurance and re-insurance give rise to special problems, here usually business men contract with one another, and considerations prevail which differ from other types of insurance where a business firm and a lay man are involved in the bargain.

(*z*) M. Leo, *Die Exporteurbedingungen, Zentralblatt fuer Handelsrecht*, vol. I, 1926, p 118 *et seq*

(*a*) *Recht des Warenkaufs*, p. 101; see also N. Isaac, 34 Columbia Law Rev. 271 (1934).

The law of insurance presents some difficulties, it is, curiously enough, one of the most national branches of the law One gains the impression that Continental governments regard insurers as particularly ruthless, and the citizens desiring to insure their lives and property as singularly helpless Germany, Austria (*b*), France, and Switzerland passed special Acts not only for the supervision of insurance companies—this is also the case in England—but also for the regulation of insurance contracts. It is, therefore, advisable to deal separately with the law of the respective countries

In **England,** insurance other than marine insurance is mainly governed by the common law It follows that the application of insurance conditions is on all fours with the application of general conditions issued by other trades. As pointed out above, the prospectus contains the conditions or privileges which are later on incorporated in the policy The proposal form which the applicant is obliged to sign does not invariably contain a reference to the conditions The proposal form constitutes the offer which has to be accepted by the insurer This is usually done by a letter of the insurer to the assured to the effect that the risk has been accepted and that the assured is held covered The policy is only issued after some time has elapsed, and here the conditions are incorporated. In the majority of cases a notice is prominently printed on the policy advising the assured to read the policy immediately and to communicate all possible objections to the insurer

So much as to the facts; now as to their legal significance Where it is not absolutely certain that the assured expressly agreed to the printed conditions the question arises whether he did so by conduct. Two periods must be distinguished

If, after the delivery of the policy, the assured raises no objection with regard to the conditions he must generally be

---

(*b*) The Austrian Contracts of Insurance Act of 1917, which prevailed in the formerly Austrian territories of Czechoslovakia, has now been extended to the whole of that country with minor alterations: Act of July 3rd, 1934, Z. A I P. R., vol. 9, p. 244 *et seq.*

taken to have tacitly agreed to them. Occasionally a receipt of the assured, together with a declaration by him, is required so that all doubts might be removed

As to the period between the acceptance by letter of the risk and the delivery of the policy, there can hardly be any doubt as to the consent of the parties Insurance contracts are not made like sales of goods in a store The assured takes some time to consider the insurance terms on their merits Unlike the above catalogue cases, the assured must be expected to have read the company's conditions, and will either not send in a proposal or object to the conditions when submitting one.

In fact, hardly one case seems to exist where the application of insurance conditions was at issue Only *Baker* v. *Yorkshire Fire and Life Assurance Co.* (c) will be mentioned. The plaintiff was insured with the defendant company and sued for the recovery of the sum insured The defendant pleaded the arbitration clause in the policy, according to which no action could be brought against the company unless the case had first been referred to the arbitrator This the plaintiff had not done. He contended that he had never submitted to the arbitration clause In spite of this contention the action was stayed "The plaintiff sues on the policy, and by so suing affirms it to be his contract; he cannot disaffirm a part of the very contract on which he is suing" (*d*). In other words, the plaintiff by his conduct had assented to the application of the conditions in the policy True, this case does not cover the above proposition, inasmuch as it was not acquiescence after receipt of the policy, but the action on it, which was held to constitute the tacit agreement But the proposition is not defeated by the decision. The point simply did not arise, as there was an act of the plaintiff (the action) which did not make it necessary for the defence to rely upon the forbearance (the acquiescence with the policy).

Should it occur that the assured objects to the conditions on the receipt of the policy the only effect could be to challenge

(c) (1892) 1 Q. B. 144. (*d*) *Per* Coleridge, C J , at p. 145 *et seq*

the existence of the whole contract, but it cannot fairly be held that the insurer's obligation holds good without the conditions to which the assured objected (*e*) Still, there remains uncertainty in English law as to the period within which the assured shall be allowed to challenge the policy and the conditions inserted therein.

(8) There are a few anomalous cases where the terms of the policy were at variance with the terms originally agreed upon between the parties. The first in time is *General Accident Insurance Corporation* v *Cronk* (*f*) There the proposal form stated that the applicant should pay the premium as soon as the risk was accepted The risk was accepted, but the policy, which was issued in due course, contained new terms not mentioned in the proposal The assured thereupon refused to pay the premium, but on the company's action for payment he was held liable Wills, J , laid down: The assured "must be taken to have applied for the ordinary form of policy issued by the company. If the wrong form of policy was tendered to him he, no doubt, had the right to insist on receiving the correct one. But the fact that the wrong form of policy was tendered to him did not relieve him from the obligation to accept the policy for which he did apply or from the obligation to pay the premium" As reported, the decision is not altogether clear What the learned judge probably meant to say was that the contract was concluded on the usual terms of the company, and that they, and they alone, were part of the contract in spite of a wrong form of policy having been issued If that is so, the assured ought also to be bound by usual terms though he was not aware of their existence It remained, however, an open question whether the terms must be usual in the trade or the usual terms of the insuring company. The latter solution would be grossly unfair to the assured, who might by accident fall in with a company using a quite uncommon form. The former solution grants the assured at least the slight safeguard of being bound

(*e*) No question of severability ever arises in this class of cases as happens when one of several conditions is illegal See below, p. 94.

(*f*) (1901), 17 T. L. R 233 (Div Court, Wills and Phillimore, JJ.).

by something amounting to custom of the trade The last alternative was indeed adopted in the recent case of *Symington & Co.* (No. 2) v. *Union Insurance Society of Canton, Ltd.* (*g*). What happened was this After a slip had been drawn a policy was issued containing in its margin a clause providing that the policy should "not inure to the benefit of any fire insurance company It is warranted and agreed by the assured that any shore risk against fire granted herein shall not cover where the assured or any carrier or other bailee has fire insurance which would attach if this policy had not been issued" The arbitrator found (*h*): "(a) That the policy issued so far as it contained the fire clause was a not unusual form of marine policy on goods, (b) that it was not the usual form of marine policy on goods, and (c) that it was the usual form of marine policy on such goods issued by the appellants." On these findings the Court held the plaintiff free of the marginal clause The decision is the more remarkable as the original contract embodied in the slip only bound the defendants in honour and was unenforceable in law (*i*). The principal point was perhaps slightly obscured, though of course the Court of Appeal's decision in *Symington's Case* could not, and was not intended to, be impeached by Macnaghten, J 's judgment in *South-East Lancashire Insurance Co , Ltd.* v *Croisdale* (*k*) In this case the parties had orally agreed on a rebate clause if the insured omnibuses should be off risk for a time during the year In the proposal form the defendant bound himself to accept the policy "subject to the terms, exceptions and conditions prescribed by the company therein" No rebate clause was in fact inserted in the policy, though the company did have a form with such a clause. The defendant having refused to pay the premium the company brought an action and failed "It seems to me quite

(*g*) (1928), 45 T. L R 181, 32 Ll. L Rep. 287 (C A).
(*h*) After it had been sent back to him see *Symington* v. *Union Insurance Society of Canton, Ltd.* (No. 1) (1928), 34 Com. Cas. 23, 31 Ll. L Rep. 179 (C A.).
(*i*) Sect. 22 of the Marine Insurance Act, 1906.
(*k*) (1931), 40 Ll L. Rep. 22.

clear," said the learned judge (*l*), "on the true construction of this proposal form, that Mr. Croisdale was entitled to have the common form of insurance policy issued by the plaintiff company. They could not alter their common form of policy to the detriment of the defendant." It is respectfully submitted that the reasons advanced do not quite support the decision, which is, however, in accordance with *Symington's Case* As far as can be gathered from the report, the question in issue was not whether the company usually issued policies with or without a rebate clause, but whether the company had or had not issued the policy previously bargained for by the assured. Besides, if any question of usage had existed the usage of the trade and not that of the company would have been material under the rule in *Symington's Case* There was, however, another difficulty in *Croisdale's Case* Apparently the defendant had not remonstrated in time, and the plaintiffs had pleaded estoppel The report does not show any satisfactory argument on this point, and the learned judge's remarks may, therefore, perhaps appear somewhat startling He expresses himself in this way (*m*): "I accept his (the defendant's) statement that he did not read the policies and I do not think he was bound to read them Of course, he took the risk of not reading them. But it seems to me, if there was any obligation on one side or the other, there was an obligation on the part of the company to call attention to the fact that they were not allowing a rebate" It is submitted that the decision would have been the other way had the policy contained, as it often does, a conspicuously printed admonition to read and to compare it with the original agreement.

(9) As was pointed out above, **German** policies are to a large extent bound to conform with the Contracts of Insurance Act (*Versicherungsvertragsgesetz*) There the period within which the assured will be allowed to object is settled by law. Para. 5 of the Act provides that, except in the event of the

(*l*) At p. 23. (*m*) At p. 24.

assured having been mistaken about a point, no policy shall contain a clause limiting the assured's right to challenge the policy to less than a month after receipt. Consequently, all German companies limit the period to raise objections to one month An entire absence of actions for declaring inapplicable insurance conditions on the ground of missing assent to them is the result of this statutory provision coupled with the proviso in the policy However, one objection might be raised Suppose the assured alleges that he did not know the conditions in the policy and that he did not consider himself bound by them Would the insurer be able to rely upon the clause limiting the assured's right to object to one month ? I believe the insurer would be able to establish the binding force of the conditions For the person receiving the policy must be taken to read its terms A duty to do so may be said to lie on the recipient of the policy If he does not avail himself of this possibility the ultimate responsibility must fall on him. As a matter of business the applicant is invariably handed the insurance conditions before signing the proposal form.

That this be done is made a statutory duty incumbent upon the insurer in **Switzerland.** Under para 3 of the Swiss Contracts of Insurance Act, the insurance conditions must either be printed on the proposal form, or they must be handed to the assured on a separate paper If the insurer forbears to comply with the provision the applicant is not bound by his proposal This means, according to the *Bundesgericht's* decision (*n*), that he is free to decline the policy. If in spite of the insurer's non-compliance with the statutory requirements the assured accepts the policy without reserve the policy conditions become the *lex contractus* That is to say, by acquiescing in, and not objecting to, the policy, the assured by his conduct declares his assent to the terms and conditions inserted therein.

A similar situation prevails in **Austria.** In the decision dated June 15th, 1927, the *Oberster Gerichtshof* lays down (*o*)· In the

(*n*) *Entscheidungen des Bundesgerichts*, 1930, II, 314, Z A I P R, vol. 5, 697.

(*o*) Z A. I P R, vol. 4, p. 100.

event that the assured has not been handed the insurance conditions he is not bound by his proposal, and may reject the policy Wahle, in his comment, challenges this decision. He is of opinion that para 1 of the Austrian Contracts of Insurance Act, on which the judgment turns, merely regulates the question whether or not the insurer is bound to stand by his offer. If, as in the case under consideration, the assured had no knowledge of the conditions, the contract comes into existence with the provisions of the statute instead of the conditions as *lex contractus* Para 1 of the Act does not, in his opinion, provide that the insurance contract may only be made under certain printed conditions It is respectfully submitted that Wahle's view of the relevant paragraph in the Act cannot be correct. If the insured did not know the conditions on signing the proposal form and the insurer sent him a policy with conditions, there is an inconsistency between offer and acceptance, and the Court's decision must stand (*p*). In either case at least the tacit agreement of the assured to the conditions is required by the Act.

It may be noted in passing that the **Czechoslovakian** Supreme Court takes a very strict attitude towards this duty (*q*) In this case the insurer's agent merely read the most important clauses to the applicant before the latter signed the proposal form. The Court did not accept the assured's defence that the knowledge of the remaining clauses was not brought home to him. He might have asked the agent to read him all clauses or to supply him with a complete copy. If he did not do so it was his fault; he has to blame himself for his negligence, and he alone has the responsibility for it In another respect, Czechoslovakian law is more favourable to the assured. Para. 2 (2) of the Contract of Insurance Act provides that in the event of any divergence between proposal form and policy the insurer, when tendering the policy, shall clearly indicate

---

(*p*) Cp. *Canning* v. *Farquhar* (1886), 16 Q B. D. 727 (C. A.).
(*q*) *Juristenzeitung*, 1931, p. 1204, Z. A. I. P. R., vol 6, p. 447.

the divergence If this is not to remain a dead letter, the Courts will have to interpret the provision as giving effect to the terms of the proposal form in preference to those of the policy should the statutory provision not be complied with.

Conditions other than Insurance Conditions

(10) Passing to cases dealing with our subject independently of insurance, we should first mention the Scottish case, *Oakbank Oil Co , Ltd.* v *Love and Stewart* (*r*) There a clause was printed in red ink at the top of a letter containing an offer According to the clause " all offers over a period are subject to stoppages through strikes, lockouts, &c , and the right to cancel is reserved in the event of any of the countries from which our supplies are drawn becoming engaged in war " As might be expected, the clause was held to be part of the contract (*s*)

On the other hand, it was laid down by the **Czechoslovakian** Supreme Court (*t*) that a clause on the invoice limiting the time for objections to eight days did not bind the purchaser of the goods, as the contract had already been concluded, and the purchaser was not obliged to protest against the clause (*u*).

(11) We now propose to turn to banking contracts in **Germany** (*x*) This class of contracts forms a peculiar transition from contractual agreement with the conditions and the binding force of them by way of usage Neither one nor the other actually occurs, though in law agreement exists, sometimes express and sometimes by conduct Invariably a new customer signs a declaration that he has taken notice of the conditions or that he has received them as the case may be In spite

(*r*) (1918) S C (H L) 54, see Esslemont, Commercial Law of Scotland, 1929, p 21.

(*s*) See also *The Tasmania* (1888), 13 P. D. 110, *per* Sir James Hannen, P , where a towage agreement was involved.

(*t*) September 29th, 1932, *Juristenzeitung*, 13, Zl 23, Z.A.I P R , vol 8 (1934), p. 483

(*u*) Otherwise probably in **U.S.A.**, see Restatement, Contract, § 70, Illustration 3, where an exclusion of warranties printed on the label of goods sold was held to bind the purchaser. But contrary **France:** see Planiol and Ripert, *l c* , vol 6, p 564

(*x*) Raiser, *l.c.*, pp. 133—141.

of all their caution, German bankers refrain from asking their customers definitely to agree to their conditions Caution is here defeated by thrift, for such agreement would be liable to stamp duty (*y*). The conditions fall into two sets, the one setting out clauses intended to become binding forthwith, the other only when occasion arises The former clauses would immediately produce the contract on which stamp duty becomes payable, for this reason a formal assent is dispensed with, and the declaration of receipt proves sufficient for all practicable purposes

The banks rightly believe that if a customer after having been given the conditions unreservedly made a specific contract, the conditions would form the *lex contractus* According to the rule of good faith (*Treu und Glauben*) the customer is under an obligation to acquaint himself with the conditions, if, after he had the opportunity to do so—a fact to be proved by the bank—he entered into a contract with the banker, his conduct shows that he has tacitly agreed to the condition (*z*). That was what happened in the ordinary course of business There are, however, cases where the customer, intentionally, negligently or inadvertently, failed to comply with the banker's request, and did not furnish him with the receipt declaration That does not alter the situation as concerns the substantive law, for the customer had in fact received the conditions and had been given an opportunity to read them In one case (*a*), the plaintiff had received the conditions, together with the request to sign and return the attached declaration form. The plaintiff omitted to do so. "This silence under the present circumstances allows of no other construction than that the plaintiff did not

---

(*y*) Each State has still got its own Stamp Act, but there are plans to substitute them by one Act for the *Reich*

(*z*) Staub and Gadow, *Kommentar zum Handelsgesetzbuch*, § 346, note 17, Dueringer-Hachenburg-Werner, *Handelsgesetzbuch*, § 346, notes 13 and 16. Schmidt-Rimpler, *Ehrenbergs Handbuch des Handelsrechts*, V , 1, 1, p 654; A. Koch, *Die allgemeinen Geschaftsbedingungen der Banken*, 1932, p. 21, RGZ 84, 3, 112, 258, 122, 76, RG in *Juristische Wochenschrift*, 1930, p 633.

(*a*) RG in *Bankarchiv*, vol 9, p. 142 (November 20th, 1909)

desire to raise objections against the conditions, but rather that he should be bound by them " The case is interesting, as even before the receipt of the conditions the plaintiff had raised a loan with the banker The Court held that the plaintiff had to reckon with the presence of conditions (*b*) Moreover, the continuance of the legal relations under the given circumstances has the same effect as the creation of a new relation would have had. In other words, the loan agreement was during its currency altered by the tacit assent on the customer's part

On another occasion (*c*) the *Reichsgericht* laid down The customer was a man who ought to know that the banks usually contract under their special conditions If he received them in July, and without acknowledging their receipt, but also without objecting to them, entered into negotiations with the bank in September, his conduct implied that he recognized their binding force. In general there is no difference in the legal situation as regards the substantive law, whether or not the customer acknowledges the receipt of the conditions, but recently a case arose where the written acknowledgment of the banker's conditions was regarded as the performance of an incident required by the substantive law. The conditions usually comprise a clause reserving a pledge of all the customer's documents of title which come into the bank's possession. The general law requires a pledge of documents to be executed by a written assignment Recent decisions of the *Reichsgericht* make it clear not only that the agreement of general conditions at the beginning of business relations constitutes the anticipated agreement concerning the creation of a pledge, but that the written acknowledgment of general conditions is also a sufficient writing to satisfy the law's requirement of a written assignment of documents (*d*). Apart from this, a written acknowledgment

(*b*) A similar reasoning is used in the English case, *The Kite*, (1933) P. 154, see above, p 50

(c) March 31st, 1924, *Bankarchiv*, p 456, see also RGZ 122, 16 (October 2nd, 1928)

(*d*) RGZ 135, 85 (February 5th, 1932) assignment of claim against wharfinger, *Reichsgericht in Bankarchiv*, vol 32 p. 501 (May 2nd, 1933),

might improve the banker's position under the adjective law, for the written receipt is the best proof of the conditions having been brought home to the customer.

Finally, if after the first bargain between the parties the conditions come into force they continue to be binding during the rest of the business intercourse It may happen that the relations are temporarily discontinued and resumed at a later date without the banker supplying the customer with a new copy of the conditions Following the rules laid down on the previous pages, the *Reichsgericht* decided that even in that case the conditions shall be the *lex contractus* in so far as they were not altered in the meantime (*e*). Fairness requires that the discontinuance does not extend over too long a period. The Court must satisfy itself that the customer could reasonably be expected still to know of the conditions, and still to be able to inform himself about their contents. This might not be the case if the customer resided abroad during the interval, especially where banking conditions are not common. In this connection it is necessary to bear in mind that German banking conditions are standardized to a very large extent More than 90 per cent of the German banks are united in the *Centralverband des Deutschen Bank-und Bankiergewerbes* The Association has drafted special conditions which practically all members have adopted with very slight modifications. The specimen conditions are printed privately in the *Bankgeschaeftliches Formularbuch* (precedents of banking business), the eighth edition of which was published in 1936. Curiously enough, the new edition shows no sign of the momentous legislation which subjected the banks to a strict State control since 1933. Even the clause authorizing the banker to attend and vote in general meetings of limited companies, whose shares the customer has deposited with the banker, whether or not the account is over-

---

Oberlandesgericht Kiel, *Bankarchiv*, vol. 32, p. 161 (December 2nd, 1932). certificate of mortgage of real property deposited with banker is subject to pledges See Raiser, *l c.*, p. 141.

(*e*) March 12th, 1927, *Juristische Wochenschrift*, 1927, p 1467: six months' discontinuance is not too long.

drawn, continues despite the vehement criticisms in the official lawyers' press (*f*). Though the subject treated here does not occur in English law, the underlying principles are the same. Everything depends on the rule which, as in German, is also a rule in English law, namely that every man must be taken to know what he has the means of knowing whether he has availed himself of those means or not (*g*)

Customer has no Opportunity of Seeing the Conditions.

(12) We now pass to a group of contracts where again special conditions are issued, where again the agreement of the parties is required, but where the circumstances of the bargain usually make it impossible for the person not issuing the forms to acquaint himself with their contents until the contract is actually concluded. These are the cases of railway and cloakroom tickets and of similar documents such as receipts, which a few years ago gained a certain publicity among lawyers in this country (*h*).

(a) At the outset it will be convenient to consider the formation of the contract in the ticket cases Swift, J., laid down the law in *Nunan* v *Southern Railway Co* (*i*) in words

---

(*f*) *Zeitschrift der Akademie fuer Deutsches Recht*, vol. 1, p 22, *Wirtschafts-prufer*, 1934, p. 359 Legally the clause is necessary because the pledgee as such has no right to vote The clause has given the banks an enormous influence over big business Without investing a single penny of their own money, they often were in a position to control big undertakings merely by means of their customers' votes Private shareholders were always very rare in general meetings of limited companies.

(*g*) *Per* Pollock, C B , in *Stewart* v *London and North Western Railway Co* (1864), 33 L J Ex at p 200

(*h*) For the nature of tickets, see J H. Beale, Jr , 1 Harv L R 17 *et seq* The legal position is the same as in Great Britain in South Africa, in spite of the difference of the general law R W Lee, Introduction to Roman-Dutch Law, 3rd ed , 1931, p. 222, and cases cited there, *Peard* v *Rennie & Sons* (1895), 16 Natal Law Rep 175, *Central South African Railways* v *McLaren* (1903), Transvaal Supreme Court, 727, *Dyer* v *Melrose Steam Laundry* (1912), Transvaal Prov. Div of Supreme Court, 164 As to Scotland, see *Gray* v. *London and North Eastern Railway Co* , (1930) S C 989. For **France,** cases ranging from 1873 to 1926 are cited and discussed in Planiol and Ripert, *l c* , vol 6, p. 159

(*i*) (1923) 2 K B 703, 707, see *Thompson* v *London Midland and Scottish Railway Co* , (1930) 1 K B 41, 47

which have since then been applied without any criticism (*k*): "The proper method of considering such a matter is to proceed upon the assumption that where a contract is made by the delivery, by one of the contracting parties to the other, of a document in a common form stating the terms upon which the person delivering it will enter into the proposed contract, such a form constitutes the offer of the party who tenders it, and if the form is accepted without objection by the person to whom it is tendered this person is as a general rule bound by its contents and his act amounts to an acceptance of the offer by him whether he reads the document or otherwise informs himself of its contents or not, and the conditions contained in the document are binding upon him." These words, it is submitted, fairly represent the legal situation, though the following pages will show that the strict application of the offer and acceptance doctrine to happenings of such unique a nature may cause hardship to the passengers However, as concerns railways, the common law has been largely superseded by statute, and the former only prevails where tickets are issued for special occasions such as cheap return and excursion tickets, though they alone are sufficiently numerous.

(b) The ticket cases experienced a peculiar development. It took some time until general rules were laid down by the Courts. The earlier cases show a marked caution, and judges slowly groped their way through the maze of problems. In *Toll* v. *South Eastern Railway Co* (*l*), the main question turned on the limitation of liability clause in a cloakroom ticket. The Court found that the plaintiff had previous knowledge, that he had complied with a number of clauses on account

(*k*) *Nunan's Case* was applied in *Grein* v *Imperial Airways, Ltd.* (1935), 53 Ll. L Rep. 51, *per* Lewis, J , and (1937) 1 K. B 50, 55 Ll. L Rep. 318, in the Court of Appeal, *Fosbrooke-Hobbes* v *Airwork, Ltd. and Another* (1936), 53 T. L. R. 318, 56 Ll L. Rep 209, *per* Goddard, J. *Nunan's Case* was criticised by Professor Hughes only, 47 L Q R 459 (1931), but see *contra*, Sir Frederick Pollock, Law of Contracts, 10th ed., 1936, p 51. For an excellent account of the history of the conditions, see Fletcher, *l c* , pp. 174 *et seq.*, 214 *et seq* , Raiser, Z. A 1 P. R , vol. 8, p. 17 *et seq.* For ordinary journeys, see Railways Act, 1921, and Statutory Terms and Conditions, 1927.

(*l*) (1862), 12 C. B N. S 75.

of that knowledge, and that the defendant company "had used all reasonable means to make known to the depositors . . . the terms on which they received deposits" (*m*). In *Stewart* v. *London and North Western Railway Co* (*n*), it was said that it was a rule of English law "that every man must be taken to know that which he has the means of knowing, whether he has availed himself of those means or not" The Court held that the passenger had the means of knowing, inasmuch as the clauses were inserted in the company's time tables, and were referred to on the ticket Pigott, B, stressed (*o*) that this was an excursion train, and the company was therefore not acting as a common carrier If the passenger agreed to be conveyed at a lower rate, he could also see to his own luggage and have it transported "at passenger's own risk." Five years later, Cockburn, C J. (*p*), finds it "harsh . . to hold a man liable by the terms and conditions which may be inserted in some small print upon the ticket, which he only gets at the last moment after he has paid his money, and when nine times out of ten he is hustled out of the place at which he stands to get his ticket by the next comer" However, he feels himself bound by authority to hold "that when a man takes a ticket with conditions on it he must be presumed to know the contents of it, and must be bound by them." In this case, for the first time, an attempt was made to consider the conflicting interests of the parties, but the time was not yet ripe to expound more elaborate rules. Another point of the judgment appears to be noteworthy. The learned judge considers it hard to hold a man bound by conditions ousting the general law of contracts. One might feel inclined to argue that it ought not to make a great difference to him, for ordinarily a man is just as little acquainted with the general law, an ignorance which he tries in vain to plead in a civil action. It must, however, be borne in mind that the ordinary law comes into existence by a cumber-

(*m*) *Per* Erle, C.J , at p 83
(*n*) (1864), 33 L J Ex 199 *et seq.* (*o*) At p. 201.
(*p*) *Zunz* v. *South Eastern Railway Co.* (1869), L. R 4 Q. B. 539, 544

some process protected by safeguards which do not exist in the cases of general conditions (*q*) Even where non-statutory law is concerned, and where no legislature has attempted a fair solution, the rules are at least time-honoured if sometimes slightly accidental.

There was judgment for the plaintiff in *Henderson and Others* v *Stevenson* (*r*) Lord Chancellor Cairns laid down (*s*) that the general notice of the conditions which were hung up in the booking office of the wharf was insufficient, as "no evidence whatever was given that the pursuer (viz, the purchaser) saw, read, or indeed had any opportunity of reading the general notice" There was no bar against a person taking the whole risk of the voyage upon himself, but the company, "by a mere notice without such assent, can have no right to discharge themselves from performing what is the very essence of their duty" (*t*).

(c) This brings us to the leading case which endeavours to set out the problem concerned According to Mellish, L J.'s judgment in *Parker* v *South Eastern Railway Co* (*u*), four principal questions of fact should be left to the jury, viz Did the person receiving the ticket see or know that there was writing on the ticket?—If not, the conditions failed to bind the ticket holder Did the person receiving the ticket know there was writing, and did he know or believe that the writing contained conditions?—If this was the case, the conditions would hold good Did the purchaser of a ticket know there was writing on the ticket and not know or believe that the writing contained conditions?—If so, the conditions were of no avail Did the person accepting a ticket know there was writing on it, and not know or believe they contained conditions, but was "the delivering of the ticket to him in such a manner that he could see there was writing on it reasonable notice

(*q*) For this reason different rules of construction ought and partly do apply for law and contractual terms below, pp 122, 132.
(*r*) (1875), L R. 2 H L (Sc & Div) 470
(*s*) At p. 473 (*t*) *Per* Lord Chelmsford, at p 476
(*u*) (1877), 36 L T 540, 543.

that the writing contained conditions " ?—Where this must be answered in the affirmative, the conditions prevail.

These rules were applied to all subsequent cases (*x*), but they were qualified by four propositions set out by Stephen, J., in *Watkins* v *Rymill* (*y*)

A person accepting a document may not unreasonably suppose that the form only contains a mere acknowledgment of an agreement but does not contain any terms of the contract. Conditions shall not be printed in a fraudulent manner so as to mislead the person accepting the document Neither shall a condition be printed in a way likely to mislead and actually misleading the purchaser though there is no fraudulent intention Some or all conditions can in themselves be unreasonable or immaterial to the main purpose of the contract

(13) Having set out the general principles, we must now analyse three or four incidents which frequently occur in these and like cases What is reasonable notice of conditions ? How does the reference in one document to another one influence the decision? Are the personal qualities of the parties material, and, if so, to what extent ? Are there any other considerations which the judge should bear in mind in the individual case ? The answer to these questions is of importance beyond the ticket cases, where they were mostly decided.

Notice and Other Circumstances

(1) The question of what is reasonable or sufficient notice only covers the notice of the existence of conditions, and even an affirmative answer to this question says nothing about the party actually having acquainted himself with the contents. In deciding the question, all the circumstances must be taken into account, and no hard and fast rule can be formulated.

(*x*) *Watkins* v *Rymill* (1883), 10 Q B D 178, *Richardson* v *Rowntree*, (1894) A C 217, *Hood* v *Anchor Line (Henderson Bros.), Ltd*, (1918) A C. 837 (H L.), *Nunan* v *Southern Railway Co*, (1923) 2 K B 703, *Thompson* v *London, Midland and Scottish Railway Co*, (1930) 1 K B 41, *Rogers* v *London, Midland and Scottish Railway Co., Times* Newspaper, February 15th, 1930.

(*y*) *Loc cit* at pp 188, 189.

For example, in *Henderson* v *Stevenson* (above) it was held that a limitation of liability clause printed on the back of a ticket, on the face of which was no reference to the endorsement, was not assented to by the passenger if the latter had not read the clause. Again, where an aeroplane was chartered for a special occasion by correspondence and no condition appeared in the letter, or indication was given that a charter or ticket would subsequently be issued, to be incorporated in the original contract, and this charter with conditions was later on handed to the charterer at the very last moment without any opportunity of reading it, the condition was held not to apply (*z*) On the other hand, the case of *Burke* v *South Eastern Railway Co* (*a*) shows that the conditions printed on the back of a cover of a coupon book was reasonably brought to the passenger's notice Finally, as to the notice by poster in the booking office of the company, here again much depends on the circumstances of the case. Such posters were held sufficient under the special circumstances prevailing in *Watkins* v. *Rymill*, but insufficient in those in *Henderson* v. *Stevenson*.

(ii) The reference in one document to another document involves considerable difficulties In principle this method of determining the terms of a contract is without fault It has an old and venerable tradition; for it can be traced back to the *Corpus Juris* of the Emperor Justinian Hence it was accepted into the English law "*Verba relata inesse videntur*" was declared to be law in this country (*b*).

A German lawyer characterizes the customer's assent to such reference as a "declaration of risk" (*c*) As Dr Raiser explains (*d*), the customer accepts the risk of creating legal relations the contents of which he does not know. As he is often

(*z*) *Fosbrooke-Hobbes* v *Airwork, Ltd. and Another* (1936), 53 T. L R. 318, 56 Ll L Rep 209, *per* Goddard, J , who also held that the charterer's guest is in the same position as the charterer himself.

(*a*) (1879), 5 C P. D 1.

(*b*) *Piggot* v. *Stratton* (1859), 1 De G. F & J. 33, 44

(*c*) Siegel, *Archiv fuer zivilistische Praxis*, vol. 111, p 92

(*d*) *L c* , p 170.

not in a position to avoid the danger, the Courts have the duty to protect him as well as they can. For it ought to be realized that the claim for protection is stronger in the case of a mass contract than in a single one, where the words of Scrutton, L J., though used in slightly different surroundings, have their full force (*e*). "It would be very dangerous to allow a man over the age of legal infancy to escape from the legal effect of a document he has after reading it signed, in the absence of an express misrepresentation by the other party of that legal effect." Indeed, the first English "reference" cases were concerned with circumstances which allowed the parties ample time to peruse the necessary documents. For instance, in *Doughty* v *Bowman* (*f*), a lease and an underlease were concerned, in this case Parke, B , laid down that a covenant to perform the covenants of a lease has no other effect than if the former covenants had been inserted.

The rule encountered difficulties when applied to contracts made in hasty modern life where the parties had no leisure to read the documents and to compare the one with the other in order to arrive at a definite conclusion with regard to the actual meaning of the *lex contractus* An interesting example is *Phœnix Insurance Company of Hartford* v *De Monchy and others* (*g*) "It was agreed that no suit or action for the recovery of any claim arising under this policy shall be maintainable in any Court unless such suit or action shall have been commenced within one year from the date of the happening of the loss out of which the said claim arose." This clause was incorporated in a marine policy, but not inserted in the certificate of insurance. The certificate in turn had a clause according to which both documents were to be read together An indorsee of the certificate failed to comply with the clause, as he did not know of it, and brought an action against the insurer some time after the year had expired. Nevertheless there was judgment for

(*e*) *Blay* v *Pollard and Morris*, (1930) 1 K. B 628, 633 (C A.).
(*f*) (1880), 11 Q B. 444, 454
(*g*) (1929), 45 T. L. R. 543, 168 L T. 267 (H L)

him. Lord Dunedin laid down in the House of Lords (*h*) "that all clauses of the policy which are essential to the contract of marine insurance must be read into the certificate, but beyond that there is no necessity to go. The condition in question is a collateral stipulation imposing a condition precedent It has nothing to do with insurance particularly, but might be applied to any contract Common sense and fairness revolt against the idea of this being enforced against the holder or indorsee of the certificate. . . Against them it may be fair to assume ordinary insurance clauses, but not to assume a collateral agreement of this sort" (*i*) In this case there was an absolute impossibility for the indorsee of the certificate to inform himself of the clause in the policy It might not be far short of this in the case of tickets or receipts where the tickets refer to other notices such as posters, time tables, &c Nevertheless it is common and recognized practice of railway companies to print on the tickets a reference to the time tables and posters, and such reference is regarded as sufficient (*k*).

Similar rules prevail in **Germany.** Posters were declared sufficient notice in case of railway and tramway companies provided they do not contain clauses to which the passenger most certainly would not subject himself voluntarily (*l*) The expression is rather vague, and the English rule preferable In no case can the customer be bound by new conditions which

---

(*h*) At p 546

(*i*) This is the same argument as in the case where a cloakroom ticket provided for the luggage to become the company's property unless called for within two days This was held unreasonable in *Parker* v *South Eastern Railway Co.* (1877), 2 C. P D 416 (C A) Cp the case of receivers of goods who have no means of knowing the terms of bills of lading and charter-parties The difficulties are discussed by Sir Boyd Merriman, P, in *The Njegos* (1935), 53 Ll L. Rep 286, 296 See also *Thomson* v *Micks, Lambert & Co.* (1933), 47 Ll L Rep 5, 22 *et seq*, *per* Branson, J bill of lading holders other than shippers are not bound by terms in the bill of lading, under which general average (if any) should be adjusted according to York-Antwerp Rules, if they did not see the bills though they might have seen them. But cp *De Clermont and Donner* v *General Steam Navigation Co* (1891), 7 T L. R 187, *per* Wright, J.

(*k*) *Stewart* v. *London and North Western Railway* (1862), 33 L. J Ex 199, *Penton* v *Southern Railway*, (1931) 2 K B. 103; *Thompson* v. *London, Midland and Scottish Railway* (above).

(*l*) RGZ 84, 103 (October 26th, 1921), 109, 304 (December 10th, 1924)

have not yet been printed, and which he for that reason cannot possibly know or take cognizance of (*m*)

German marine insurance conditions become *lex contractus* if the parties refer to them expressly or by implication (*n*) The implied reference is here by no means obnoxious, as the conditions were agreed upon also by the customers' organisations and the Chambers of Commerce.

Reference in one document to another document is also usually permitted in this kind of cases in **Austria** (*o*) and in **France** (*p*), where, as in England, the Courts have largely dealt with ticket cases.

(m) After this short excursion into foreign laws we return to the questions arising in **England** in connection with ticket and similar cases The next point to consider is the personal quality of the party dealing with the undertaking which issues the conditions (*q*). In *Richardson and Others* v. *Rowntree* (*r*), a ticket was purchased for a voyage from Philadelphia to Liverpool containing a clause whereby the shipping company's liability was limited to $100 Apart from other reasons the personal quality of the passengers induced the House of Lords to declare the reasonable notice as not existing (*s*) Different considerations may prevail if an experienced person, as, *e g*., a

---

(*m*) *Reichsgericht* in *Bankarchiv*, 28, 185 (September 25th, 1928), see Raiser, *l c*, p 170, note 4

(*n*) Ritter, *l c*, vol 1, p 6 See above, p 24

(*o*) R Mayr, *Lehrbuch des Buergerlichen Rechts*, vol 2, 1923, p. 42, note 7, where decisions are quoted

(*p*) Planiol and Ripert, *l c*, vol 6, p 159

(*q*) The personal quality of the parties has been judicially pronounced upon in restraint of trade cases, *e g*, *North Western Salt Co*, *Ltd* v *Electrolytic Alkali Co*, *Ltd*, (1914) A C 461, *English Hopgrowers* v. *Dering*, (1928) 2 K B 174 (C A) The relative economic strength was held to be a criterion for discovering the validity of "penalties" by Goddard, J, in *Imperial Tobacco Co*, *Ltd* v *Parslay* (1935), 52 T L R. 61, but his decision was reversed by the Court of Appeal at pp 585, 588 *et seq*

(*r*) (1894) A. C. 217 (H L.).

(*s*) *Per* Lord Ashbourne, at p 221 "The ticket in question . was for a steerage passenger—a class of people of the humblest description, many of whom have little education, and some of them none. I think, having regard to the facts here, the smallness of the type in which the alleged conditions were printed, the absence of any calling of attention to the alleged conditions, and the stamping in red ink across them, there was quite sufficient evidence to justify the learned judge in letting the case go to the jury"

lawyer, is concerned, or where both parties belong to the same class, as is the case, for example, with business men. Thus a shipbroker delivering a bill of lading is entitled to assume that the person who ships goods knows what a bill of lading is (*t*).

Still, even the personal circumstances of the party cannot be considered in the air They must be looked at in the light of the general standard of the community, so as not unduly to embarrass routine business This proposition is borne out by Lord Hanworth, M R 's remarks in *Thompson* v *London, Midland and Scottish Railway Co* (*u*), where the plaintiff pleaded that she was illiterate and thereby prevented from taking notice of printed conditions The learned Master of the Rolls did not accede to that contention "Having regard to the authorities and the conditions of education in this country, I do not think that avails her in any degree" Sankey, L J (as he then was), remarks *obiter* (*x*) that, of course, there might be cases where a similar contention would impress the Court as when the time table "were printed in Chinese"

What is the attitude of **German law** to these problems ? A merchant in Mannheim shipped goods on the Rhine , part of the goods were lost, and the recovery of damages had been made subject to a limitation of liability clause in the conditions of the transport undertaking The owner of the goods contended that he did not know that any special conditions were in existence. But the Court decided against him and declared the limitation of liability clause to be the *lex contractus* together with the other conditions All transport undertakings of Mannheim, the Court reasoned, had agreed upon uniform conditions to be applied to all contracts The conditions were published in the local newspapers On these facts the *Reichsgericht* held that, as the goods-owner was a business man in Mannheim, he could be

(*t*) *Per* Mellish, L.J., in *Parker* v. *South Eastern Railway* (1877), 36 L. T. at p 543. (*u*) (1930) 1 K. B 41, 46.

(*x*) See Scrutton, L J , in *Kidston* v *Deutsche Lufthansa A.G.* (1930), 38 Ll L Rep 1 (C A.), where a contract made in England was partly printed in German. Cp *The Luna*, (1920) P 22. Cp *Hood* v *Anchor Line*, (1918) A. C 837.

expected to read the local press with respect to notices which were of importance to his trade. For this reason ignorance of the conditions did not prevent the transport undertaking from relying on the limitation of liability clause (*y*). Again, the principal point taken by the Court is the fact that the parties belong to the same class of persons. If this is the case the conditions have almost the nature of usage, which, too, prevails independently of knowledge It is interesting to observe what happens if occasionally a layman enters into a typical business contract English (*z*) and German decisions agree that in such a case the layman must "bear the consequences of his own exceptional ignorance."

Another instance of the Court having regard to business expediency is the *Reichsgericht's* decision in the following case (*a*). The plaintiff sued the organizer of a concert for damages resulting from the loss of two fur coats, which had been deposited in the defendant's cloakroom during the concert A clause limiting the measure of damages was printed on the ticket and on a poster exhibited in the cloakroom. The Court was of opinion that a visitor to a concert could not be expected to read the tickets in the hurry, but that he ought to have taken notice of the poster "In view of the circumstances the person in charge of a cloakroom cannot be expected orally to bring home to each person using the cloakroom the clause in order to make it part of the contract Business requires a speedy dispatch of the public using the cloakroom. Therefore, the generally known *Verkehrssitte* (business usage) has developed that special conditions for the acceptance . are generally made known to the public by way of posters"

(iv) Finally, a number of miscellaneous circumstances of the bargain must be dealt with in this connection; they may warrant the application of special conditions, and make a notice reasonable, and, on the other hand, may make an otherwise

(*y*) RGZ 82, 103 (October 26th, 1921).
(*z*) Mellish, L J , in *Parker* v *London and South Eastern Railway* (above).
(*a*) RGZ. 113, 425, 427 (May 14th, 1926)

reasonable notice unreasonable. Again reference should be made to *Watkins* v *Rymill* (*b*) What happened was this. The plaintiff deposited a wagonette in the defendant's repository in order to put it up for sale on commission He accepted a document containing a receipt followed by the words: "subject to the conditions as exhibited on the premises." Condition 10 of them read. "Should any horse or other property sent to this repository remain over one month the proprietor shall be at liberty to sell the same by public auction only, with or without notice to the owner, unless all expenses are previously paid. All horses, carriages, carts, &c sent to this repository for sale remain at the risk of the owner" The one month having elapsed, and the expenses not having been previously paid, the plaintiff's wagonette was sold by public auction He sued for damages on the ground that he did not read the condition in question, and was not bound by it His action was dismissed The plaintiff ought to have known that the receipt contained conditions relevant to the contract. For "the acceptance of a carriage for sale on commission is not a simple contract, the terms of which are established by the common law in the absence of any special agreement by the parties", therefore, it would have been the plaintiff's duty to inquire about the terms of the agreement (*c*). The decision would have been the other way had the conditions embraced a term which had nothing whatever to do with a sale on commission, but would have been applicable to other contracts as well (*d*)

Again, in *Hood* v *Anchor Line, Ltd* (*e*), the plaintiff bought a ticket for a journey from New York to Glasgow on one of the defendants' steamers The ticket was handed to the plaintiff's agent, who in turn paid the price by cheque. The ticket was wrapped in an envelope on which was distinctly printed. "Please read conditions of the enclosed contract," a request

(*b*) (1883), 10 Q. B. D. 178 (*c*) *Per* Stephen, J., at p 189
(*d*) This case was followed by Wright, J., in *De Clermont and Donner* v *General Steam Navigation Co* (1891), 7 T. L R 187 relation between mate's receipt and bill of lading.
(*e*) (1918) A. C. 837.

which was not complied with. Therefore, after damage had occurred to the plaintiff's luggage, he contested the defendants' right to apply the limitation of liability clause Again, the decision turned on the question was there sufficient notice ? All circumstances were taken into account, and the question was answered in the affirmative, and the action dismissed Viscount Haldane said (*f*) "If it had been merely a case of inviting people to put a penny into an automatic machine and get a ticket for a brief journey, I might think differently In such a transaction men cannot naturally be expected to pause to look whether they are obtaining all the rights which the law gives them in the absence of a special stipulation But when it is a case of taking a ticket for a voyage of some days . . I think ordinary people do look to see what bargain they are getting, and should be taken as bound to have done so and as precluded from saying that they did not know"

(14) A question similar to those in ticket cases arises in respect of bills and posters in hotels and restaurants limiting the liability of the owners English Courts are of opinion that such notices are capable of reducing the liability as desired (*g*), unless the notice is so worded that it fails to operate on account of the words used (*h*).

The same opinion prevails in **France,** but with one exception No notice, however definitely and comprehensively drafted, can exclude the liability for intent and, according to general opinion, for gross negligence, moreover, the amount of damages to which the notice seeks to reduce the liability must be of appreciable value (*i*)

(*f*) At p 845.

(*g*) *Orchard* v. *Connaught Club, Ltd* (1930), 46 T L R 214 (Div. Court Scrutton, Slesser, L JJ)

(*h*) *Carpenter* v *Haymarket Hotel, Ltd* (1930), 47 T. L R 11 (Div. Court: Swift and Acton, JJ), where there was a notice *inviting* guests to deposit valuables in the hotel office

(*i*) Planiol and Ripert, *l c* , vol 6, pp 564, 568 *et seq* , in how far the debtor may exempt himself in advance from liability on account of acts committed by his agent is described by Planiol and Ripert, *l.c.*, p. 565 *et seq.*

Swiss law has made special provision for hotel notices. Art. 489 (2) of the Law of Obligations lays down: "The innkeeper cannot escape liability by declining it in notices exhibited on the premises, or by making it dependent on conditions not named in the statute." The commentator of the Code, H. Oser, remarks that this provision only intends to exclude this special form of exemption from, or limitation of, the innkeeper's liability There is nothing in the Act to prevent him from expressly contracting out, or making an implied contract to that effect which stops short of the named method It would also seem that by making this provision for innkeepers specially, Swiss law has no objection to notices being used to exclude or limit liability in other trades

(15) Another problem must be touched upon in one or two words It often happens that more than one common form is used, and that doubts exist which of the two or more is applicable in the individual case If that occurs one may well speak of a conflict of forms This phenomenon is mainly found in shipping cases where the terms of the charter-party and the bill of lading do not conform with each other. The following cases must, however, be excluded First, where all parties to both contracts are not identical, but only one of the persons concerned is a party to both contracts, the first contract is broken by the second one (*k*), or, if this is done intentionally, the second contract is void (*l*). Secondly, a true conflict does not arise where, though two contracts are in existence, the question can be solved by construing the terms of one of them (*m*). An agreement may also be reached if, though both contracts are made between the same parties, the second contract was

(*k*) As, *e g*, in *Muirhead* v. *The Forth and North Sea Steam-Boat Mutual Insurance Association*, (1894) A. C 72 (H L, Sc.), which was a case of over-insuring by taking out policies with two companies, this was forbidden by the terms of the first policy Thus there was really no doubt which of the two forms applied

(*l*) H Lauterpacht, Contracts to Break a Contract, 52 L Q R 524, where the legal situation under English, French and German law is discussed

(*m*) This occurred in *Furness Withy & Co., Ltd* v *Duder*, (1936) 2 K B. 461, *per* Branson, J. conflict between marine insurance policy and towage contract with Admiralty.

intended to alter the first one. That happened in *Repetto* v. *Millar's Karri and Jarrah Forests, Ltd.* (*n*), where Bigham, J., laid down (*o*): "The bill of lading is supplemental to the charter-party, and creates the liability which but for the bill of lading would probably be gone, namely, the liability to pay the freight. The two documents, which must be read together, are in a sense a contract, but the bill of lading, which is the later document, I think overrides the charter-party and makes the defendants liable to pay the freight."

If no alteration of the first contract is intended by the second one, the first contract governs the relations between the parties, and the terms of the second contract, which are in conflict with those of the first one, do not apply (*p*)

Usage

(16) Though the possibility is more or less admitted, hitherto no decision of a Court exists declaring a certain condition to have the nature of usage, and binding the parties without their consent, and their means of knowledge. The preceding paragraphs may have shown that the law is, in some places, in a state of transition from contract to usage. True, the assent of the party to the other's condition is still the ingredient on which all decisions turn But in various trades and industries of all countries special printed conditions have spread to such an extent that the Courts can no longer refrain from declaring as usage the fact that conditions do exist. They proceed in this way. As in the past, the supreme rule is the consent of the parties However, conditions as such are so usual in commercial

---

(*n*) (1901) 2 K. B. 306, cp *Gullischen* v *Stewart Bros* (1884), 13 Q B D. 317 (C. A), particularly Lord Coleridge, C.J., at p. 318, and Bowen, L.J., at p 319. (*o*) At p 313.

(*p*) *Temperley Steam Shipping Co* v *Smyth & Co.*, (1905) 2 K. B. 791 (C A), *per* Collins, M.R, at p. 802 "The position of a charterer, who ships and takes a bill of lading . is, I think, that . there is the underlying contract of the charter-party which remains until it is cancelled, and taking a bill of lading does not cancel it in whole or in part unless it can be inferred from the inconsistency of the terms of the two documents that it was intended to do so. . . ." See also *Krueger & Co, Ltd* v *Moel Tryvan Shipping Co., Ltd.*, (1907) A. C. 272 (H. L.).

life that they can almost be called usage. Though the contents vary, the existence of conditions is so common that a duty lies on the other party to enquire in each case whether or not, and what kind of, conditions are employed. If the party fails to do so it is in many cases taken to have assented to them It comes to this. In a very great number of cases rules set up by one party function as law the knowledge of which is presumed The doctrine of *ignorantia juris non nocet*, familiar to most countries, is partially extended to private contracts (*q*)

A significant situation is thereby revealed Lawyers teach as the classic rule, that the law should be applied strictly without regard to individuals who are subjected to the law Law shall be applied equally to persons who know it and who do not know it On the other hand, contractual terms have to be agreed to, that is to say, parties to contracts have to know the terms if they are to govern the contractual relations Can this still be said to represent the state of the law ? A glance at the rules in Soviet Russia is apt to show that there the rule of *ignorantia juris* is denounced as akin to the "*bourgeois*" order. In 1925 the Russian Supreme Court laid down that neither the Soviet legislature nor the Soviet judge is to apply that maxim; for it gave an advantage to the person who knew the law best or who was able to enlist the help of the best lawyers. Such a state of affairs is no longer suffered to continue. Therefore, "in all proceedings where the tribunals are faced by this problem, they must be guided by the social position of the parties, their degree of education, and the other circumstances of each particular case" (*r*).

Such reasoning sounds familiar and strange at the same time Where did we come across it before ? Certainly not in the province of the general law ! Rather in the province of private

(*q*) Error of the legal consequences of a declaration may be material in Germany, France, and Italy. See also *Progetto di Codice della Obbligazioni e dei Contratti*, October, 1927, art 16, being a project of an uniform French-Italian Code

(*r*) Eliachevitch, *Traité de Droit Civil et Commercial des Soviets*, vol 1, 1930, p 151 *et seq.*

contractual law. There the "*bourgeois*" countries in turn use the social position of the parties, the degree of education, and all the circumstances of the case as factors for the determination of whether or not contractual terms, if in common form, should apply Here and there we find the same reasoning though in different provinces of the law. For the same reason, in Soviet Russia the law is to a certain extent only applied if the parties know it, and in the "*bourgeois*" countries contractual terms are frequently applied even where one of the parties does not know them In Soviet Russia part of the law tends to become contract; in the "*bourgeois*" countries part of the contracts tends to become law This development by no means indicates a *rapprochement* of the two systems of law Rather does it signify an increasing divergence. Thus the differences between legal systems grow, and make an understanding increasingly difficult, if not impossible.

Chapter III.

ALTERATION OF STANDARDIZED TERMS.

(1) The problem of an alteration of standardized terms is somewhat complex. It will be discussed under three headings: The alteration of conditions in general, the deviation from the conditions in an individual case, and the influence of cartels and other agreements within trades and industries upon the alteration of, and the deviation from, the printed conditions of an individual undertaking.

(2) First as to the alteration of printed conditions in general. Not only the wholesale alteration of all conditions by a single stroke is contemplated, but also the change, deletion, or addition of an individual clause with a view to altering such clause in all contracts, or in a specified group of them. It frequently happens that a clause is not accepted as valid by the Courts, or that they give it a construction which is adverse to the intention of the person issuing it. In such cases the undertaking's or association's draftsmen at once undertake the task of re-drafting the clause in order to meet the objections, and the newly-drafted clause is in future applied to the relevant contracts. On famous occasions the new clause even bears the name of the case which caused its new formulation. But such incidents do not call for special discussion. The alteration is here a purely internal matter.

The subject of this chapter is different. Suppose a contract is entered into between two parties and is not directly executed, but it runs for a certain time, such as insurance contracts, long term purchase, loan, or service agreements. Is it possible unilaterally to alter such contracts if one clause calls for a new form in consequence of the decision of a Court? From the undertaking's standpoint this might seem highly desirable.

Reference need only be made to *O'Reilly* v. *Prudential Assurance Co., Ltd.* (*a*). In this case the validity of a clause in a life insurance policy was at issue. The company pointed out during the proceedings that the decision of the Court would affect not less than 26,000,000 policies If in this case the clause had been declared invalid, the Prudential would have had a very great interest in altering the invalid proviso in the outstanding policies so as to protect itself from further damage

Generally speaking, the alteration of conditions is governed by the same rules as laid down in the previous chapter. Express or tacit consent is required (*b*) Usage can have no place in the present discussion; for the party's conduct is aimed at exactly the contrary to usage, namely, a disusage, an innovation is the point in dispute Apparently no decision of a Court of law bears directly on this problem Nevertheless it might be worth while briefly to touch upon one or two questions

Suppose two business firms have entered into a long term agreement whereby A. regularly sells to B. subject to certain printed conditions On the inception of the contract the conditions came into force by A. sending them to B. and the latter thereupon beginning to transact business with A. without special reference to the conditions. If A later on sends B a revised copy of his conditions, this alone will probably make no difference If, however, the new conditions contain a clause showing A.'s intention to alter even the terms of current contracts, and B acquiesces, the revised conditions will then probably become the *lex contractus*, provided A. has made it sufficiently clear that the new set contains alterations In any case, if the current agreement is only a frame agreement, and the individual transactions have a new cause and consideration, then the new conditions would more easily apply, unless circumstances prevail indicating the opposite effect.

(*a*) (1934), 50 T L R 273 (Clauson, J.).

(*b*) Expressly mentioned for **Austria** by R Mayr, *Lehrbuch des Buergerlichen Rechts*, vol 2, 1923, p 42, note 7

It happens occasionally that there is a clause in the original conditions authorising the issuer to alter them from time to time without the consent of the other party This was the case, for instance, in *Doyle* v. *White City Stadium, Ltd* (*c*). It frequently occurs in articles of association of limited companies, and the question was particularly important with regard to German banking contracts (*d*) Fairness demands that the person issuing the conditions does not act in a tricky manner and insert conditions which are not peculiar to the bargain in hand If something entirely new is desired to be incorporated, then, it is submitted, an express agreement will have to be reached, or the other party's attention will have to be directed to the alteration in question with special insistence

There is an interesting **French** case concerning mutual insurance (*e*) A B became a member of a mutual insurance society and took out a life policy Under the articles of association and the terms of the policy, both the society and the member were entitled to terminate the contract every five years On the other hand, the new member agreed that he would recognise and consider himself bound by the resolutions to be passed from time to time by the general council or the board of directors of the society Before the first five years had expired the general council passed a resolution to the effect that the term of five years should be extended to a period of ten, and this resolution was approved by the general meeting The power to pass such a resolution had been granted to mutual societies within the five years' period of the contract under consideration by art. 55 of the French Ordinance of March 8th, 1922 Subsequently A B gave notice to the society, after the first five years had elapsed, in order to terminate the agreement of membership and the policy The society objected with reference to the resolution having extended the period to ten years The dispute came before the Courts, and the Court of Cassation held that the resolutions of the general council of the society were in this

(*c*) (1935) 1 K B 110 (C A) (*d*) Above, p 61
(*e*) November 29th, 1931, Dalloz, *Hebd*, 31 569, Z A 1 P R, vol 5, p 40

particular case not capable of interfering with, or altering, current contracts Professor Esmein, in his comment on the report, believes the reason for the judgment to be the rule laid down in earlier decisions, that a new statute does not influence current contracts unless providing so *expressis verbis* Consequently the company's meeting has no authority to do what statutes or decrees are unable to do as a rule to change the terms of current contracts by altering its articles of association In view of the fact that A B had consented in advance to any alterations of the articles and terms, the correctness of the judgment appears to be somewhat doubtful, though it is interesting to note how the sacrosanctity of contracts is being observed.

The **English** case of *British Equitable Assurance Co , Ltd* v. *Baily* (*f*) decided that an alteration of the bye-laws of a participating insurance company did not constitute a breach of contract with the assured (*g*).

In **Germany,** sect. 41 (3) of the Contracts of Insurance Act provides that the alteration of the articles of association or of the general conditions of insurance contracts influences current contracts only in the event of the assured agreeing expressly with the change, or, in case of a mutual insurance company, if the articles expressly provide for the change of certain clauses with binding force for outstanding policies (*h*)

All this only applies to contracts of a long duration Where contracts are immediately executed, the undertaking issuing

---

(*f*) (1906) A. C 35 (H L)

(*g*) Had this been the case the alteration would have been disallowed see *British Murac Syndicate, Ltd* v *Alperton Rubber Co , Ltd* , (1915) 2 Ch. 186, *per* Sargant, J. See *per* Lord Lindley, M R , in *Allen* v *Gold Reefs of West Africa, Ltd* , (1900) 1 Ch 656, 673 " A company cannot break its contracts by altering its articles, but, when dealing with contracts referring to revocable articles, and especially with contracts between a member of the company and the company respecting his shares, care must be taken not to assume that the contract involves as one of its terms an article which is not to be altered." Cp. *Punt* v *Symons & Co., Ltd* , (1903) 2 Ch 506, 512 But see *In re May air Property Co* , (1898) 2 Ch 28 (C A) articles cannot be altered by the terms of a debenture issue

(*h*) RGZ 56, 292, 295 (December 29th, 1903); 112, 119 (November 20th, 1925); 113, 278 and 280 (April 27th, 1926)

conditions is at liberty to change them as it pleases To do so might, however, be risky It was shown in the previous chapter that in a vast number of cases it was customary to set up conditions, and that the customer was bound to inform himself about their contents Now, suppose a railway company alters its conditions without printing the change in a conspicuous manner; in such cases, it is submitted, a daily traveller would not be bound by them For he cannot be held liable to search the conditions every day for possible alterations, unless the Court comes to the conclusion that he intended to be bound by any conditions the company might issue, provided they were peculiar to the contract of carriage This consideration will have to prevail in all similar cases.

(3) We now pass to the variation of printed conditions in an individual case. This is rather a wide problem, and only a few aspects can be touched upon here which are more closely connected with the subject of this work Occasionally the conditions contain a no-variation clause reserving the right to vary individual clauses to specified officers of the undertaking, or, conversely, excluding the right of certain servants to do so (*i*) In the absence of such a clause deviations are permitted by mutual consent, though sometimes special formalities must be observed. Thus in *L'Estrange* v. *Graucob, Ltd.* (*k*), a clause in a sales' agreement excluded any express or implied condition, warranty, statutory or otherwise, not stated in the agreement, thereby in effect providing for possible deviations to be expressly named in the contract. Utmost publicity was also claimed by Scrutton, L J., in *Symington & Co.* (No. 2) v. *Union Insurance Society of Canton, Ltd.* (*l*), if the printed terms were altered to the customer's detriment "If it was their intention to alter the terms of the slip, they must say so in express terms and not leave it to be implied" (*m*)

(*i*) *Harris* v *Great Western Railway Co.* (1876), 34 L T. 647.
(*k*) (1934) 2 K B 394 (C A)
(*l*) (1928), 45 T L R. 181 (C A)
(*m*) *Per* Scrutton, L J., at p. 182 In case third parties are affected, their consent is also necessary, *e g* , the head policy cannot be varied by insurer and

Exceptional circumstances may produce an implied variation of printed conditions, as a rule in favour of the customer. In *Wing* v *Harvey* (*n*), a life policy had a proviso that the assured should not reside beyond the limits of Europe. In spite of that he emigrated to Canada, and the premiums were duly paid by his creditor to the local agents of the insurer After the assured's death the insurer repudiated his liability on the ground of a breach of a condition by the assured. The Court held the insurer liable The local agents had been perfectly aware of the assured's change of residence, they continuously forwarded the premiums to the insurer's head office, and a duty lay on them to communicate to the directors the alleged breach of condition. If they had failed to do so the insurer remained liable under the policy Usually, and very likely also in this case, local insurance agents have no permission to grant variations from the company's printed forms However, in *Wing* v *Harvey* special circumstances prevailed The breach of the residence proviso extended over several years, so that the agents were deemed to have communicated the assured's non-compliance with the condition to the directors Consequently, the directors ought to have objected before; if they failed to do so they were probably deemed to have waived the breach, and estopped from setting up the original condition.

Again, in *Hemmings* v. *Sceptre Life Association, Ltd.* (*o*), there was a proviso in the policy avoiding the contract and forfeiting the premiums paid if the assured had wilfully misrepresented his true age After a while it transpired that the assured had given a wrong age by mistake, and a dispute arose between the directors and the assured. No further developments took place, and the directors accepted without reserve two subsequent premiums. Later on they seem to have changed their minds, claimed the payment of higher premiums, and refused to pay

assured without the concurrence of the re-insurer who had insured " subject to the same clauses and conditions as the original policy and/or policies, and to pay as may be paid thereon." See McCardie, J , in *Norwich Union Fire Insurance Society, Ltd* v. *Colonial Mutual Fire Insurance Co , Ltd* , (1922) 2 K B 461, 467.

(*n*) (1854), 23 L. J. Ch. 511.

(*o*) (1905) 1 Ch. 365.

the sum insured on the happening of the risk. It was held that the policy was not void as there was no wilful misrepresentation; moreover, the company had to pay the sum insured as the directors had adhered to the bargain by accepting without protest two yearly premiums after the mistake had been discovered. By this conduct they were estopped from making any claim for increased premiums, and a variation of the condition was completed.

No no-variation clause was mentioned in the policies referred to in the above two cases. Even the existence of such clauses would, it is submitted, have made no difference The necessary facts had come to the notice of the competent persons, or, at any rate, must be deemed to have reached them, or if the relevant facts did not reach them, it was through the fault of the competent persons themselves by not having given stricter directions to their agents The insurers were estopped from setting up the original conditions as a defence

The **Austrian** Supreme Court came to the same conclusion on the basis of sect 13 of the Contracts of Insurance Act (*p*) If the authorised agent of the company orally allows grace for premiums, and the company thereupon frequently claims the payment of arrears, the company can no longer plead the condition under which the variation of printed conditions can only be effected in writing. The special measures provided for in case of the assured's default had been varied through the agent's oral promise, coupled with the conduct of the insurer himself

Finally, an interesting instance may be mentioned with regard to the law of **France.** Under the decree of March 18th, 1893 (*q*), sworn insurance brokers are forbidden to vary terms of marine policies unless such variation was mentioned in the slip (*arrête*) determining the agreement between the parties (*r*).

(*p*) April 4th, 1928, *Rechtsprechung*, 1928, No 217, Z A. I. P. R., vol 5, p 141.

(*q*) A summary of the decree may be found in Z A. I. P. R., vol 5, p. 366.

(*r*) See *Symington's Case* above, pp. 57, 86 As to the position in **Germany**, see Raiser, *l c* . p. 230 *et seq.*

(4) It was mentioned before that often whole trades and industries agree among themselves to issue uniform conditions for their business transactions with customers. In that case no alteration or variation of the terms may be effected by an individual undertaking belonging to the trade association. Should they do so in spite of the cartel agreement, the latter's breach does not affect the validity of the individual contract between the undertaking and the customer, unless the breach is intentional, thus making the contract between the latter persons unenforceable (*s*)

(*s*) Lauterpacht, 52 L Q R. 494 *et seq.*

Chapter IV.

THE INVALIDITY OF CONDITIONS IN STANDARDIZED CONTRACTS.

(1) Hitherto the question has been discussed by what means conditions in common form are put into operation between the parties It will now be convenient to enter upon the discussion of the treatment which the conditions, when applied, should receive from the Courts In the previous chapters the Court had to decide whether the conditions or any part thereof had become the *lex contractus*. In this chapter the question will be dealt with under what circumstances conditions which *primâ facie* are part of a contract do not bind the parties because they are not in accordance with the general law. The problem is familiar to all laws, and is not confined to the law of contracts. It returns in the *ultra vires* doctrine of company law, and the constitutional lawyer also is acquainted with it, particularly in countries living under a "written" constitution requiring a qualified majority for a change of the constitution.

Every law sets up general prohibitions beyond which the individual is not allowed to extend his activities. The terminology varies, but the gist of the prohibitions is more or less the same. No private individual is permitted to act contrary to the letter and spirit of the law.

I.—Repugnancy to Legal Provisions.

(2) The repugnancy to the *jus strictum*, that is to say, to compulsory provisions of the law, affords no particular difficulties and can be disposed of comparatively briefly. The laws of all countries concur that no contractual term, and, consequently, no printed condition shall be valid if it is repugnant to the *jus strictum*. Of course, different laws vary as to what kind

of provision they deem compulsory The number of such provisions is vast, and it would be in vain to attempt even a summary of them. Only a few English instances of printed conditions may be mentioned which were held by the Courts to be repugnant to compulsory rules of law Thus, where a contract between a shipping company and steerage passengers contained clauses not approved by the Board of Trade in accordance with sect 320 of the Merchant Shipping Act, 1894, such clauses were held void (*zz*), and it was laid down in *John Edwards & Co* v *Motor Union Insurance Co , Ltd* (*a*), that in view of sect 4 (2) (b) of the Marine Insurance Act, 1906, a marine policy with a p.p i. clause is void as contrary to a compulsory statutory provision.

Furthermore, Langton, J., in *The Torni* (*b*), held that a bill of lading clause could not escape the compulsory provisions of the Palestine Carriage of Goods by Sea Ordinance, No 43 of 1926, which incorporated clause 4 of the Hague Rules; and in a salvage agreement a clause providing for the salvage to be paid to a ship belonging to His Majesty's Navy was held void as contrary to the rule which prohibited Admiralty ships to claim salvage remuneration (*c*) The Road Traffic Act, 1934, s. 12, enumerates a number of points which are not capable of defeating a third party policy if a certificate of insurance has been delivered under sect. 36 (5) of the Act, and sect. 38 invalidates an arbitration clause in *Scott* v. *Avery* form (*d*).

Finally, *British Trawlers Federation, Ltd.* v. *London and North Eastern Railway Co* (*e*) decided that certain conditions imposed

---

(*zz*) *O'Brien* v. *Oceanic Steam Navigation Co , Ltd* , (1914) 3 K B 731 (C. A.), arising from the Titanic disaster

(*a*) (1922) 2 K. B. 249, McCardie, J., as to the practice of pinning on and detaching p p i. clauses from policies, see the pertinent remarks of Scrutton, L J., in *Cheshire & Co* v. *Vaughan Bros* , (1920) 3 K B 240 (C A); 25 Com. Cas 242, 251

(*b*) (1932) P. 27. affirmed by C A , p. 78, see Scrutton, L J., at p. 83 *et seq*

(*c*) *Admiralty Commissioners* v. *Owners of M.V. Valverda* (1936), 53 T. L. R. 194, (1937) 1 K B 745 (C A), Greer, L.J , dissenting

(*d*) A simple arbitration clause is permitted by the Act see *Jones* v. *Birch Bros , Ltd* , (1933) 2 K B 597 (C. A), but cp *Freshwater* v *Western Australian Assurance Co , Ltd* , (1933) 1 K B 515 (C A).

(*e*) (1933) 2 K. B. 14 (C A).

by the defendants as harbour- and dock-owners of Lowestoft on persons using the dock were contrary to sect 33 of the Harbours, Docks, and Piers Clauses Act, 1847 In this case, however, the public character of the conditions and the monopoly exercised by the defendants influenced the Court to a certain extent It need hardly be mentioned that where statutory conditions are in force contractual terms not in conformity with such conditions will usually be void to the same extent as if the conditions were actual law (*f*) The statutory clauses become the *lex contractus* whether they are printed or not

(3) A recent Scots example is the Hire Purchase and Small Debts (Scotland) Act, 1932 (*g*), which sets up compulsory provisions for hire-purchase agreements; their non-observance invalidates the said contracts

In other countries insurance and transport are usually compulsorily provided for, and the statutes governing those trades mostly affect the validity of printed conditions (*h*)

(4) This is what often happens in life insurance policies. Sometimes a clause is there inserted to the effect that after a certain currency the policy shall become incontestable (*i*). It need hardly be mentioned that such incontestability only extends to provisions of which the parties have control It was laid down in *Anctil* v. *Manufacturers' Life Insurance Co* (*k*), that by virtue of this clause the insurers in an action for the recovery of the sum insured were not estopped from setting up compulsory provisions of law as a defence This rule is not

---

(*f*) *E.g*, *Citizens Insurance Co. of Canada* v. *Parsons* (1881), 7 App Cas 96 (J C.), where statutory clauses of an Ontario Insurance Act were in issue.

(*g*) See, generally, Esslemont, Commercial Law of Scotland, p 101; as to hire purchase in England, see R. A Eastwood, The Contract of Sale of Goods, 1929, p 75 *et seq*

(*h*) For **France**, art 15 of the 1930 Act with regard to forfeiture clauses in policies; generally Planiol and Ripert, *l.c*, vol. 11, p 626 *et seq*, for earlier law. Perreau, *Rev. Trim*, vol 26, p 306, **Germany**, Contracts of Insurance Act, and generally § 138 of the Civil Code, Raiser, *l.c*, pp 314, 308 *et seq*., and Z A I P R, vol 8, pp. 17, 19.

(*i*) *Beresford* v. *Royal Insurance Co., Ltd.* (1936), 52 T. L R. 650, *per* Swift, J., see below, p 102

(*k*) (1899) A. C. 604 (J C)

restricted to insurance, but prevails throughout the law of contract If a statute making compulsory a particular provision, and thereby causing a repugnancy between the law and the printed condition, was passed during the currency of the contract, the clause will not become invalid, unless the statute has retrospective force Should that be the case there will be no breach of contract by the alteration of the condition.

French law treats the incontestability clause in a similar way Though everybody seems to consider the clause valid a difference of opinion exists as to how far the clause should be applied Planiol and Ripert (*l*) quote a decision of the Besançon Court dated December 9th, 1931, by which a policy was invalidated in spite of the clause because the applicant had omitted to disclose that she was expecting a child The learned authors see the value of the clause in a waiver by the insurer of grounds for rescission in case of wrong declarations which the applicant made in good faith On no account, however, may the clause be used as a means of evading rules of law demanded by public policy and morality Any fraudulent manœuvres on the assured's part give the insurer the right to avoid the policy in spite of the clause.

Italian Courts have established a line of decisions which uphold the incontestability clause even where the applicant knowingly withheld information from the insurer Only where he has actually deceived the insurer, or has maliciously thwarted his searches, may the policy be avoided in spite of the clause (*m*). Lately a learned writer has advocated a new departure (*n*) According to him, the clause is only capable of protecting non-disclosure in good faith, thus approaching French legal opinion

(5) It was said that the illegality of an individual clause cannot affect the applicability of the conditions as a whole

---

(*l*) *L c*, vol 11, p 710
(*m*) *E g.*, Court of Cassation, February 2nd, 1933, *Foro Italiano* I, 1443, Z A. I P R, vol 10, p. 254
(*n*) Donati, *Foro Italiano*, I., 554 (1933).

Still, it might happen that the illegal clause is the most essential one in the contract, so that, with this clause deleted, the whole contract is practically valueless for the parties This leads to the question: when does the invalidity of one clause lead to the invalidity of the whole contract ? In **England** the problem is marked out by the doctrine of severance Unfortunately most cases establishing this doctrine deal with restraint of trade, and only give a limited view of the matter. If one, however, accepts Lord Sterndale's view as expressed in *Attwood* v. *Lamont* (*o*), one may easily draw conclusions applicable to cases which are the subject-matter of this work Though there will always remain cases of considerable doubt, it will often be feasible to decide whether a severance would affect the meaning of the remaining part of the contract or merely limit the sphere of its operation (*p*) If statutory conditions prevail, and special terms were agreed on which are repugnant to such conditions, the contract as such will usually not be void, but the statutory conditions will take the part of the obnoxious contractual terms (*q*).

In **Germany** the question of partial invalidity is regulated by the Civil Code, s. 139 (*r*) The intention of the parties is decisive as to whether or not it can be assumed that the contract would have been made without the void part The onus of proof for showing that the contract would have been so made lies on the party alleging the enforceability of the contract (*s*) The Court

---

(*o*) (1920) 3 K B. at p 577

(*p*) See *Putsman* v *Taylor*, (1927) 1 K B 639, *Pickering* v *Ilfracombe Railway Co.* (1868), L R 3 C P 235, 250

(*q*) *E g*, *Citizens Insurance Co of Canada* v. *Parsons* (1881), 7 App Cas. 96 (J C)

(*r*) The section reads in Dr Wang's translation "If part of a juristic act is void, the whole juristic act is void, unless it is to be presumed that it would equally have been entered into if the void part had been omitted" The same principle prevails in **Switzerland,** art 20 (2) of the Law of Obligations, see Oser, note vi, 2. In **Austria** the presumption is only for partial invalidity· see Ehrenzweig, *System des Oesterreichischen Privatrechts*, 7th ed., vol. 2, p 157 *et seq.*; 6th ed , vol 1, p 270

(*s*) RGZ 61, 284 (September 23rd, 1905), 79, 434, 439 (June 25th, 1912); Staudinger and Riezler, *Kommentar zum Buergerlichen Gesetzbuch*, § 139, note 4; here again a difference is evident between the English and the German method of construction. English Courts take a more objective view of the matter,

must be satisfied that on the formation of the contract both parties were of opinion that the void part of the contract was of minor importance, so that the remaining one would have come into existence even if they had known the void part to be void (*t*)

Sometimes a statute provides that in the event of a clause being declared void by the Court the remainder shall hold good (*u*), but it also happens that the parties agree on a term to the same effect when the contract is made, and that the contract as a whole should stand even if one of the clauses turn out to be invalid Thus, e g , the standardized hire-purchase agreements applied by members of the German Association of the Machine Building Factories (*Verein Deutscher Maschinenbau Anstalten*), and of the firms belonging to the Central Association of the German Electro-Technical Industry (*Zentralverband der Deutschen Elektrotechnischen Industrie*), provide that the contract "shall retain binding force, even if individual points of its conditions should be inoperative" (*x*) Thereby the intention of the parties is established beyond doubt In spite of this convenience in subsequent legal proceedings the proviso might be dangerous (*y*). It might force a party to adhere to a contract though the whole balance of interests is altered On the other hand, the danger is not too great. For through the invalidity of a clause in a standardized contract usually the party who drafted it will suffer damage Dr Raiser (*z*) also discusses the question, and comes to the conclusion that in common form cases the intention of the parties will generally be unascertainable, and he shows that the German Supreme Court in standard contract cases inclines to uphold the contract in spite of the invalidity of an offensive clause.

---

whereas German Courts take a more subjective standpoint They try to consider the intention of the parties, and thereby seem to meet with greater difficulties regarding the evidence

(*t*) Oertmann, *Kommentar zum Buergerlichen Gesetzbuch*, § 139, note 3, b

(*u*) *E.g.*, § 8, Contracts of Insurance Act

(*x*) H. Ruehl, *Eigentumsvorbehalt und Abzahlungsgeschaeft*, 1930, p 67.

(*y*) *L.c* , p. 68.

(*z*) *L.c.*, p 323 *et seq.*

Under **French** law the question of total or partial invalidity depends on the divisibility or indivisibility of the *cause* (*a*).

II.—Repugnancy to Public Policy.

(7) We now proceed to the consideration of the invalidity of conditions on account of their repugnancy to public policy Again, this subject is common to contracts made in common form and ordinary contracts Yet this work seems to call for a discussion of the matter, for the law of conditions in common form provides new cases of interest Moreover, in a study of comparative law the relation of the term public policy to the corresponding terms of other laws ought to be scrutinized Only if clarity is gained about these relations can a considered opinion be given as to the validity or invalidity of individual conditions

The term public policy is known to the national laws of this country, of France (*ordre public*), of Italy (*ordine pubblico*), and to international private law In Germany the *gute Sitten* (*boni mores*) more or less correspond to the term public policy, whereas the term *Gemeinwohl* (public good) has been introduced into another part of the German legislation shortly before the 1933 revolution. French and Italian, just as English law, know the *boni mores* apart from the *ordre public* Such similarity is fallacious Not only is there a considerable variation in the construction of the terms by the Courts of the respective countries, but even within the national laws the ground covered by them is full of traps. It actually applies to all laws what Planiol and Ripert say in their text-book with regard to the French *ordre public* (*b*): "*Si l'on veut y comprendre des lois relatives à des rapports d'intérêts privés, on s'aperçoit, à l'analyse, que toutes les lois touchent par un certain coté à l'ordre public. Toute loi a en effet pour objet de régler comformément à la justice les rapports qu'elle envisage et par là contribue à l'ordre public.*" Therefore the only thing to do is

(*a*) Planiol and Ripert, *l c.*, vol 6, p 363 *et seq* , for **Italy,** see Ruggiero, *Istituzioni di diritto civile*, 3rd ed , vol 1, 1921, p. 288

(*b*) Vol 6, p. 304

not to enquire into the nature of the *ordre public* in an abstract manner, but to make sure what construction the national Courts apply to this difficult term, and what bearing it has upon conditions in common form.

(8) The law of **England** on this subject is well known, though it is far from unambiguous. No complete account of the state of the law can be attempted here Only one or two questions will be raised, the discussion of which may throw light on the difference between the legal principles here and abroad, and, furthermore, are somewhat related to the conditions in standardized contracts Right through our books there runs the description of the hard battle fought in the judges' minds between the political and the legal interpretation of the term public policy.

Contracts against public policy are "agreements to do that which it is policy of the law to prevent" (*c*) But what is it the policy of the law to prevent? This naturally changes from time to time (*d*), and the interpretation is "founded on the current needs of the community" (*e*). The needs of the community are expressed in public opinion, therefore the judges must take notice of it so long as it is not in conflict with an Act of Parliament (*f*) Thus "even a cursory glance at the reports will show . the influence of the prevailing political philosophy in different stages of the law's evolution" (*g*) This will be seen in spite of express statements on the judge's part that they are not to take notice of politics. However, the subject turned out to be stronger than the power of man. We

(*c*) Anson, Law of Contracts, 7th ed , p 233

(*d*) R Y. Hedges, The Law relating to Restraint of Trade, 1932, p. 2, *per* Vaughan Williams, L J , in *Wilson* v. *Carnley*, (1908) 1 K B. at p. 738, *Evanturel* v. *Evanturel* (1874), L. R. 6 P C 1, 29, *per* Roche, J. (as he then was), in *James* v. *British General Insurance Co , Ltd.*, (1927) 2 K. B at p 321

(*e*) Professor P H Winfield, Public Policy in the English Common Law, 42 Harv L Rev. 76, 92, 100 (1928) Public policy is not "an ideal to which they (the judges) should shape English case law . It is still a useful and important barometer of educated public feeling, but it is not a machine for altering its pressure The value of the doctrine depends on the men who administer it, and the nation may rest assured that it is in safe hands"

(*f*) Winfield, *l.c.*, p 97

(*g*) Hedges, *l c* , pp 2 and 3.

see in the same report, sometimes in the decision of the same judge, the conflict between legal and political principles, and the impossible endeavour to combine two incommensurate lines of thought.

Parke, B., admits (*h*) that public policy in its ordinary sense means "'political expedience,' or that which is best for the common good of the community." That is for the statesman to decide In the Courts the term may exclusively be used "in the sense of the policy of the law, and in that sense it forms a just ground of judicial decision It amounts to no more than that a contract or condition is illegal which is against the principle of the established law" In the same decision Lord Lyndhurst quotes Lord Hardwicke (*i*), and lays down with reference to the nature of public policy, "that political arguments, in the fullest sense of the word, as they concern the government of a nation, must be, and always have been, of great weight in the consideration of the Courts. . . . These reasons of public benefit and utility weigh greatly with me, and are a principal ingredient in my present opinion."

The ambiguity hereby revealed returns in *Crown Milling Co, Ltd* v *The King* (*k*). The view of the Board was expressed thus: "It is not for this tribunal, nor for any tribunal, to adjudicate as between conflicting theories of political economy," nevertheless it goes on to consider the question whether a monopoly is contrary to the "public interest" in the meaning of the New Zealand Commercial Trust Act, 1910, which is, of course, a legal term, but at the same time it is a question which—in the absence of any statutory definition—can only be decided by applying one or the other economic theory, this again is subject to the political view taken of the matter.

So much as to the principle. But even in the most famous decisions on restraint of trade, where no mention was made of politics, the very weighing of the legal situation was clearly

(*h*) *Egerton* v. *Brownlow* (1853), 4 H. L. C. 123.
(*i*) At p. 160
(*k*) (1927) A. C. 394, 402 (J. C.)

influenced by political doctrine, thus showing that the purely judicial method is, if not a fallacy, only a relative term when cases of economic importance are concerned The outstanding utterance on restraint of trade under the aspect of public policy is Lord Macnaghten's speech in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co., Ltd* (*l*), which was expressly adopted by Lord Atkinson in *Morris, Ltd.* v *Saxelby* (*m*). It reads as follows. "The true view at the present time, I think, is this: The public have an interest in every person's carrying on his trade freely, so has the individual" Certainly one would search in vain for a similar utterance in the Court of any "non-capitalist" country Furthermore (*n*), "public interest cannot be invoked to render such a bargain nugatory to do so would be to use public interest for the destruction of property. Nothing could be a more sure deterrent to commercial energy and activity than a principle that its accumulated results could not be transferred save under conditions which would make its buyer insecure." Thus it might be regarded as perhaps somewhat misleading that the opinion has been expressed in a recent publication (*o*) that "His Majesty's judges have resolutely declined to mount their unmanageable steed in quest of the vague considerations of public interest."

It is true that until quite recently English Courts did not rely on the public interest to avoid a contract (*p*) Lord Justice Scrutton once endeavoured to do so in the case of a knock-out agreement at an auction (*q*) His brother judges declined to follow him, and he remained in the minority But he convinced the legislature, and Parliament some years later declared such agreements to be void in certain circumstances (*r*). Another

(*l*) (1894) A C. 535, 565.
(*m*) (1916) 1 A C at p 699, and see *Vancouver Malt and Sake Brewing Co*, *Ltd* v. *Vancouver Breweries, Ltd*, (1934) A. C 181 (J C), *per* Lord Macmillan.
(*n*) *Per* Lord Shaw in *Morris' Case*, at p 713 *et seq*
(*o*) A L. Haslam, The Law relating to Trade Combinations, pp 92, 110
(*p*) *Per* Lord Parker in *Att.-Gen. of Australia* v *Adelaide SS Co*, *Ltd.*, (1913) A. C. at p 795
(*q*) *Rawlings* v. *General Trading Co.*, (1921) 1 K. B. at p. 645 *et seq.*
(*r*) Auctions (Bidding Agreements) Act, 1927

attempt proved more successful. In *Wyatt* v. *Kreglinger and Fernau* (*s*) the defendants, a firm engaged in the wool trade, agreed to grant the plaintiff a pension on his retirement from their service; they attached the condition to the grant that he did not undertake any other employment or business in their trade. Later the defendants had to cut down their expenses and stopped the pension The plaintiff sued, but his action was dismissed by Macnaghten, J., who held that there was no contract, but only a voluntary payment " which the defendants were free to give or withhold at their pleasure and their discretion " (*t*) The appeal was dismissed, Scrutton, L J , adopting the learned trial judge's opinion On the other hand, Greer and Slesser, L.JJ., thought that there was a contract between the parties, and that it was void as against public policy, because it was injurious to the public to deprive it of the services of a man of sixty years (*u*) The decision was trenchantly criticised by Professor A L. Goodhart (*x*) on the facts of the case, and not on the fact that public interest was relied upon to avoid the agreement (*y*) Indeed, the term " public interest " has in substance been accepted substantially into statutes (*z*)

Now, common lawyers usually limit their discussions on public policy to a small number of instances If one compares the list with Continental laws, English law appears extremely liberal in allowing contracts which Continental laws, shaped on the Roman model, would certainly disallow by means of the *exceptio doli generalis* or some similar device. This English practice was also recognised by so eminent an equity judge as

(*s*) (1933) 1 K B 793 (C A)

(*t*) At pp 798, 800

(*u*) *Per* Scrutton, L J., *obiter*, but adopted by Greer, L.J , as *ratio*, at p 808· " The country is thereby being deprived without any legitimate justification of the services of a man of sixty years of age "

(*x*) 49 L Q R 465 (1933)

(*y*) The case is remarkable as the party which had drafted the contract invoked its invalidity in order to be released from it On account of *Wyatt's Case, In re Prudential Assurance Company's Trust Deed*, (1934) Ch 338, became necessary to determine a pension scheme's validity which contained a similar clause

(*z*) *E.g.*, sect. 23 of the Trade Marks Act, 1905, cp. sect 62. " public advantage."

Sir George Jessel, M R , who laid down in *Printing and Numerical Registering Co.* v *Sampson* (*a*), that though the list of contracts against public policy was not closed, he "should be sorry to extend it (*i e* , the doctrine) much further."

(9) However, the application of the public policy doctrine is not quite so restricted as would appear at first sight Equity has extended the field by avoiding certain agreements or measures, sometimes by referring expressly to public policy, at other times relying on other considerations which in practice amount to much the same The alteration of articles of limited companies is invalid if they are not *bonâ fide* for the benefit of the company, or if they constitute a fraud on the minority (*b*) Moreover, a Court of equity will refuse specific performance of a contract which is tainted with fraud on the public (*c*), and in *Kreglinger* v *New Patagonia Meat Company, Ltd.* (*d*), Viscount Haldane, L C , who had incidentally been a student of Continental law in Goettingen at one time, explained how "public policy" had changed with regard to the rate of interest on mortgages and the clogging of the equity of redemption (*e*)

This cursory glance shows, it is submitted, that the field of public policy is much wider than would appear from a study of the common law text-books Yet the various branches have so far not developed into a comprehensive doctrine as is the case in other laws The extent of the difference will become apparent in the treatment of the equivalent terms in Continental laws. Another difference might occur in future In spite of the changes in the interpretation of public policy, a straight line may be traced from the earliest cases right down to the present day. The reason therefor probably can be found in the fact that during the whole of that period there has never been a revolutionary change

---

(*a*) (1875), 19 Eq 462, 465
(*b*) *Dafen Tinplate Co , Ltd* v *Llanelly Steel Co* (1907), *Ltd* , (1920) 2 Ch 124, *per* Peterson, J , *Brown* v *Brit Abrasive Wheel Co , Ltd* , (1919) 1 Ch at p 296, *per* Astbury, J
(*c*) *Post* v *Marsh* (1880), 16 Ch D 395, *per* Fry, J
(*d*) (1914) A C 25, cp *Davis* v *Symons*, (1934) Ch 442, *per* Eve, J.
(*e*) Pp 36, 37.

of opinion. Should that occur, the English judiciary might be caught in a trap. Professor Chorley has shown (*f*) how a trade usage may alter from time to time until one day it is disputed and is laid down and fixed by the Courts Owing to the strict principle of precedents, especially since *London Street Tramways* v *London County Council* (*g*), it is then impossible for the usage to alter again A similar result may one day be witnessed with regard to "public policy" It tends to become stereotyped, and since the last mentioned case the judiciary has handed over the key to the legislature.

(10) Having thus attempted an explanation of the meaning of "public policy" the question arises what is its bearing on standardized contracts? At an earlier stage such contracts were said to develop the better the greater the principle of freedom of contract prevails in a given law This it does specially in this country. For "you have this paramount public policy to consider, that you are not lightly to interfere with this freedom of contract" (*h*). Thus public policy was rarely invoked in order to avoid a condition in a common form If invoked, the judges showed themselves reluctant to apply the doctrine. Still, the question was considered, though answered in the negative, where a life policy contained the clause that it should become void if the assured voluntarily entered the armed forces of the Crown without the company's licence (*i*). Recently, in *Beresford* v. *Royal Insurance Co., Ltd.* (*k*), Swift, J., held that the sum insured may be paid in spite of the assured having feloniously committed suicide. As the policy only provided for non-payment in case of the assured killing himself within one year from the beginning of the insurance, the learned judge found that a payment would not be against public policy if the suicide occurred after the expiration of that period The

(*f*) Conflict of Law and Commerce, 48 L Q. R. 51, especially at p. 63 (1933).
(*g*) (1898) A C. 375 (H. L)
(*h*) *Printing and Numerical Registering Co* v. *Sampson* (1875), 19 Eq. 465.
(*i*) *Duckworth* v *Scottish Widows' Fund Life Assurance Society* (1917), 33 T. L. R 430, *per* Coleridge, J
(*k*) (1936), 52 T L R 650

decision was reversed by the Court of Appeal (*l*). Though Swift, J.'s decision might perhaps appear in effect more satisfactory, Lord Wright, M R , who delivered the judgment of the Court, emphasised that so long as the criminal law regards suicide as a felony, a contract entitling the felon or his heirs to a payment when and if the felony is committed must be void as contrary to public policy In the writer's humble submission the material clause of the above policy, which provides for invalidity of the policy if the assured dies by his own hand, whether sane or insane, within one year from the beginning of the insurance, has the following effect Within the first year the words of the clause must be understood in their full literal meaning But in so far as invalidity is provided for in case of suicide while of sound mind, the clause only repeats the general law. After the first year the general law alone applies, and not even an incontestability clause, which strongly influenced the learned trial judge, can oust the general law as to public policy. Again, where an accident insurance policy was alleged to cover accidents brought about by the assured's own offence while driving a motor car, it was held that these indemnity policies, contrary to the general law, are valid, and are not defeated by the plea of being repugnant to public policy (*m*) Furthermore, prior to the Arbitration Act, 1889, it was laid down that a clause providing for the exclusive decision of disputes by an arbitration tribunal was contrary to public policy (*n*), though in practice such clauses could not be prevented, and now a term withdrawing a dispute altogether from the Courts would be contrary to statute.

Closely connected with this topic is an agreement to make a foreign Court exclusively competent to deal with a dispute. Such terms have grown in importance since the recent development

---

(*l*) (1937), 53 T. L. R. 583.

(*m*) *Tinline* v. *White Cross Insurance Association, Ltd.*, (1921) 3 K B. 327, 331, *per* Bailhache, J ; followed by Roche, J., in *James* v *British General Insurance Co., Ltd.*, (1927) 2 K. B 311; but see Greer, L J , in *Haseldine* v. *Hosken*, (1933) 1 K. B. 822, 838; *Home Insurance Co* v. *Lindal and Beattie* (1934), Can S. C. R. 33 (C. A.).

(*n*) *Scott* v. *Avery*, 5 H L C. 611, 848

of international traffic. Big business firms find it advantageous to concentrate all legal matters at their head offices, where they have their legal advisers Moreover, to do so assures not only the application of their domestic law, but also its uniform interpretation. The latter would be in jeopardy where the domestic law is administered by a foreign Court (*o*) However, all countries are jealous of their own jurisdiction, and English Courts particularly are loth to give up a case if they believe themselves the proper authority to deal with it In *Kidston* v. *Deutsche Lufthansa A.G* (*p*), the plaintiff purchased a ticket in Croydon for air travel in a German airplane belonging to the defendants. Under a clause printed on the ticket " the competent Court for decision of all lawsuits in connection with passenger air services shall be that of the country in which the head office of the air transport company concerned is situated." When the plaintiff brought an action in the English Court, the defendants applied for a stay of proceedings on the strength of the clause The Court of Appeal held that the action was to be tried in England Scrutton, L.J , laid down (*q*). " There are two principles which come into conflict in such an application, first of all, that it is desirable as a matter of public policy when a citizen makes a contract that he should keep it, consequently, if he has agreed to bring an action in a particular Court, it is desirable that he should be estopped from bringing the action in another Court That is one principle The other principle is that the King's Courts do not allow their jurisdiction over matters happening in England, in regard to contracts made in England, to be ousted by the agreement of the parties; they do not allow parties in England making a contract to say that the English Courts shall not deal with questions arising out of it, they reserve a discretion to consider the whole matter, considering the importance of people keeping their contracts, considering the importance of the King's Courts having jurisdiction over matters happening in England, and considering the nature of

(*o*) Below, p 133
(*p*) (1930), 38 Ll. L. Rep 1 (C. A) (*q*) *Ibid.*, at p 2.

the questions to be tried, the evidence that will have to be given and all relevant matters, to say as a matter of discretion whether they will or will not stay the action " The learned Lord Justice's words have been set out in full in order to show that a clause like the present one is not absolutely void by reason of its repugnancy to public policy; rather does this principle produce a kind of relative invalidity. The Court is neither bound to observe nor to disregard the contractual term, but public policy vests a discretion in the Court to let other considerations prevail over the agreement of the parties. In *Kidston's Case* these were strong enough to oust the clause, but in an earlier case it was thought convenient to let the parties have their way (*r*)

The great amount of freedom of contract which the English people enjoy as " paramount public policy " may account for the fact that the political aspect of this term has not hitherto worked out in an oppressive way Apart from this general reflection, it may also be the reason why in the Courts of this country the question has never arisen whether conditions in standardized contracts are against public policy on the ground that the undertaking issuing the conditions holds a legal or at least a *de facto* monopoly Thus " in England, unlike America, no contract made by a carrier has, apart from statute, been held to be unenforceable or void merely because it exonerates the carrier from responsibility, in circumstances however blameworthy. No reasons of public policy have been allowed to ' fritter away ' a common carrier's right to introduce as many exceptions into his contract as his ingenuity can invent. Customers are bound by their contracts, whether reasonable or not, even though liability is excluded for gross negligence, misconduct or fraud " (*s*)

(*r*) *The Cap Blanco*, (1913) P 130, 135, *per* Sir Samuel Evans, P Similar principles apply in the case of restraining proceedings abroad *Re Vocalion, Ltd*, (1932) 2 Ch. 196.

(*s*) Fletcher, Carrier's Liability, p 205, and cases cited The position is, of course, different for railways under the Railways Act, 1921 · see Fletcher, *l c*, p 214 *et seq* The limitation of liability clause, which in Continental laws is often repugnant to public policy, can in England only be limited in scope by strict interpretation. See *Price* v *Union Lighterage Co*, (1903) 1 K. B 750, (1904) 1 K B 412, this applies equally to carriage by sea, land and air see A D. McNair, Law of the Air, p. 119.

(11) The *Gute Sitten* in Germany.

(a) In speaking of German law in this connection one must bear in mind that since 1933 a great change has come over the law of that country. This change is felt particularly when a term is discussed which, though belonging to private law, has so close a relationship with public feeling, as is the case with the *boni mores* The greater part of the case law hereinafter referred to dates from the period down to the 1933 revolution Since then a definite line of decisions comparable with the pre-1933 one has not yet been developed For this reason some of those earlier cases ought now to be accepted with some reserve. The time has not yet arrived to give a comprehensive picture of the new German development.

Just like other countries Germany cannot do without a general term working as a brake on the activities of the citizens which, though they stop short of infringing a particular legal provision, are repugnant to the spirit and trend of the law as a whole The pass-par-tout for such purposes is the term *gute Sitten* (*t*). Dr. Ernest Schuster, the interpreter of the German law to the English speaking nations, refrains from translating the term into English, and prefers to use the Roman term *boni mores* (*u*) There is much to be said for this; for the *gute Sitten* are not confined to morality, though they certainly do comprise this meaning. The word *Sitte* also means as much as custom, and the *gute Sitten* also signify the whole manner of living and acting of the people. An act of forbearance is regarded to be within the *gute Sitten* if it complies with the principles prevailing in cultural and economic life, and the views regarded to be fair either among the people as a whole, or among members of a group within the community, such as, *e g* , doctors, advocates, business men and sportsmen. Thus the *gute Sitten* correspond to, though they are not on all fours with, the English term " public policy "; Professor Winfield proposes to translate conduct against *gute*

(*t*) This term is to be found in various parts of the German Code In spite of that a separate discussion appeared to be convenient so as to adapt the discussion to the position under English law

(*u*) Principles of German Civil Law, p. 99 *et seq*

Sitten with "unsocial" (*x*), which, generally speaking, conveys the meaning of the term admirably It appears from this translation that the *gute Sitten* covers a wider field than the English public policy Both terms, however, have this in common that they are liable to changes of public opinion (*y*). This will be seen by the following survey of the reports of the *Reichsgericht*

For instance, the resolution of a meeting of a public or private limited company might be void not only for repugnancy to a particular provision of law, or for the commission of an *ultra vires* act, but also for repugnancy to the *gute Sitten*, this is, for example, the case if the resolution aims at limiting in an oppressive manner the justified rights of the minority (*z*) There has been a considerable change in public opinion with regard to the law relating to limited companies Earlier reports hold the view that the shareholder is entitled to vote as he pleases (*a*), but later judgments abandoned this view, and laid down that the *gute Sitten* required him to consider the welfare of the company rather than his personal advantage (*b*) Furthermore, the *Reichsgericht's* judgment dated April 21st, 1931, is worth mentioning (*c*). What happened was this All German insurance companies organised under private law are liable to the supervision of a board, a public authority set up by the Insurance Companies Act (*Versicherungsaufsichtsgesetz*) of May 12th, 1901. At the request of the board the companies entered into an agreement by virtue of which certain competitive acts were declared unfair, and the parties undertook to forbear from such activities. Apart from the companies, there is a great number of insurance enterprises organised under public law

(*x*) Province of the Law of Tort, 1931, p. 39, with reference to §§ 823, 826 of the German Civil Code.

(*y*) Duerinnger-Hachenburg-Werner, *Handelsgesetzbuch*, vol 4, *allgemeine Einleitung*, note 91

(*z*) RGZ. 115, 283 (January 11th, 1927); 131, 145 (January 9th, 1931); as to English law, see above, p 101

(*a*) RGZ. 68, 245 (April 8th, 1908)

(*b*) RGZ 107, 204 (October 20th, 1923), 112, 17 (October 23rd, 1925), 132, 161 (March 31st, 1931).

(*c*) RGZ. 132, 296.

as so-called *Anstalten des oeffentlichen Rechts* (institutions or corporations under public law) The board's supervision does not extend to those bodies, neither were they a party to the unfair competition agreement They made ample use of their free position, whereupon the private companies filed an action against one of the public insurances; this action was successful. The Supreme Court laid down The method of catching clients (which was one of the acts prohibited under the agreement) as adopted by the defendant corporation was unfair within the meaning of the agreement made by the private companies. The agreement had been made under the pressure of the supervisory board, and therefore the companies under private law were unable to terminate it Thus the public corporation, merely by reason of its public character, had an advantage over its private competitors, which if employed in an unfair manner was repugnant to the *gute Sitten* within the meaning of the law. Therefore there must be judgment for the plaintiffs Another instance is the Supreme Court's decision of March 12th, 1934 (*d*). There a man took out a policy on his own life, and made the beneficiary after his death a woman with whom he had sexual relations Under sect. 166 of the Contracts of Insurance Act, 1908, he waived his right to replace her by another beneficiary during his lifetime The Court held that the policy was valid if the insurer when making the contract was ignorant of the relations between the assured and the beneficiary.

It is also worth while mentioning that the *Reichsgericht* declared void an agreement between two persons under which a payment was promised to A in consideration of which he should assist B. to win the championship in a race by persuading dangerous competitors to refrain from starting Such contract is contrary to the " views of a fair carrying on of sports," and, therefore, *contra bonos mores* and void (*e*).

A considerable portion of the German Supreme Court's time has been devoted to the problem whether or not *de facto*

(*d*) *Juristische Wochenschrift*, 1934, p 1409.
(*e*) *Ibid*, 1933, p 947; also discussed 50 L. Q. R. 178

monopolies are contrary to the *gute Sitten* if they use this situation to impose oppressive conditions on persons transacting business with them. Here only two decisions may be mentioned, the one denying, the other affirming, the question of a repugnancy to the *gute Sitten*.

An electricity undertaking which held a *de facto* monopoly in a district had large claims for arrears for setting up a plant against a factory situated in this district The factory got into difficulties, whereupon the electricity works ceased to supply the factory with current. A bank, which had previously granted a loan to the factory, secured by a mortgage on the latter's property, contracted with the electricity works to the effect that the latter should continue the supply of current to the factory in consideration of the bank's paying the factory's arrears The Court held that, being a holder of a monopoly, the electricity works had a duty to supply the current (*Kontrahierungszwang*) A breach of this legal duty amounted to an act which was contrary to the *gute Sitten* (*f*). On the other hand, the grant by a number of steamship companies of rebates to persons shipping exclusively with the said companies' vessels, though apt to create a *de facto* monopoly, was not against the *gute Sitten*, provided the means employed and the monopoly itself were within the range of the *gute Sitten* (*g*).

Finally, reference will be made to a decision of the *Kammergericht*, the Court of Appeal of the Province of Berlin and Brandenburg, dated November 29th, 1933 (*h*), which strikes a somewhat different note The case is not well reported One may, however, infer that by a contract dated August 22nd, 1930, promises were made by the parties the execution of which eventually tended to evade taxes, and to bring German capital across the frontier It must be borne in mind that at that time there existed no capital flight tax; this was not introduced until

---

(*f*) RGZ 132, 273 (March 24th, 1931)

(*g*) RGZ. 118, 84 (September 21st, 1927), see 128, 92 (March 24th, 1930), and cp *Mogul SS Company* v *McGregor*, (1892) A C 25 (H L)

(*h*) Niemeyer, *Zeitschrift fuer Internationales Recht*, vol. 49, p 101

the bank and money crisis of July, 1931. The Court held. Since this contract was made the attitude of the German citizens (*Volksgenossen*) towards such agreements had so thoroughly changed that "it cannot conform with the duty of a German Court, that a contract with such an ultimate purpose should be declared valid." It should be noted that it has hitherto been a definite rule that the Court in construing a contract, and deciding as to its validity, would not go beyond its four corners; that is to say, the Court would only declare a contract to be contrary to the *gute Sitten* if its actual contents deserved this attribute, and no regard would be given to the motives of the parties Should the above decision become a definite rule, and there is every indication that this will be so, German and English law would in this respect perhaps draw closer (*i*).

(b) This short survey will have shown that the German *gute Sitten* and the English public policy do correspond, in that they have the same function within the respective law. Naturally, different acts are declared contrary to the *gute Sitten* in Germany and to public policy in this country, but the greatest difference seems to lie in one fact which is in a way almost imperceptible. German law has a much stronger Roman tradition Down to 1900, when the Civil Code came into operation, the *Corpus Juris Justiani* was the common law of Germany The Roman law, even in its modern application, showed one important feature in common with classic law· the clear separation of public and private law, and the determination of private disputes without regard to political affairs in the widest sense. Perhaps the classic Roman law had no need for that. The Roman Empire extended over the whole of the world as it was known at that time. It was the only civilized State, at the borders of which lived barbaric tribes The Roman Empire, therefore, had no competitors in the race for the domination of the world, and it was stable in itself. This principle of entirely unpolitical justice became so deeply rooted in the civil law that it survived up to a

(*i*) Cp. *Alexander* v. *Rayson*, (1936) 1 K. B. 169 (C. A.).

time when the premise for its existence had vanished, when the nations whose private law was the Roman law were by no means the only civilized States, but members of a great family of States, and were far less stable in themselves than was the Roman Empire Though the new States would have probably needed a more political yardstick to measure the private activities of their citizens, Roman legal tradition was kept up together with the old Roman law.

This strong tradition is also part of German civil law, at least down to 1933. German lawyers were not only reluctant, but painfully shy, and even strongly opposed to legal terms which might have the tinge of the political atmosphere. When in the eighties and nineties the first preparations were made for the introduction of a Civil Code, the draftsmen first followed the French Code, which mentions in its art 133 the *ordre public* as a means of establishing what *cause* is illegal, and framed sect. 106 of the first draft: "An act-in-the-law is void if its contents are contrary to good morals or public order" But the term "public order" was subsequently deleted, as it did not allow of accurate definition, and it was thought that practically all relevant contracts could be invalidated, if desirable, by the *gute Sitten* clause The difficulty of defining "public order" is surely a fallacy. It is equally difficult to define *gute Sitten* However, "public order" aroused unsympathetic feelings, and it was left out of the new Civil Code A distinguished commentator on the Civil Code adds that he considers the deletion of the term "public order" very fortunate, as it makes impossible any reference to political considerations in the decisions of the Courts (*k*). It is truly remarkable that for more than thirty years the reports of the German Supreme Court contain no utterances which in their political importance can be compared with English pronouncements on the same subject. Apart perhaps from cartel cases, where the *Reichsgericht* did

(*k*) Staudinger-Riezler, *Kommentar zum Buergerlichen Gesetzbuch*, § 138, note I (1), likewise in **Austria**, see Ehrenzweig, *System des oesterreichischen allgemeinen Privatrechts*, 7th ed , vol. 2, 1928, p 49.

consider economic affairs as early as 1897 (*l*), this and the other German Courts took great pains to keep their reasoning strictly within the border of legal argument

Only quite recently the term "public order" was advocated and eventually adopted in an amendment to the Code of Civil Procedure, and since 1933 this and kindred terms are fairly frequent in judicial language.

(c) The *gute Sitten* and the conditions in standardized contracts. The majority of cases turns on the question of a *de facto* monopoly (*m*). This is particularly interesting, as no such case is known to English law.

A communal electricity works (*n*) granted "licences" to a number of electricity supply shops, whereby the exclusive right was conferred on the licensees to build the necessary plants for such persons who had applied to the works for connection with its system In the standardized contracts which the works made with the consumers a clause was inserted to the effect that the purchasers of current undertook to have their plant built by one of the licensed firms The owner of an unlicensed firm in the district asked for an injunction to restrain the defendants from incorporating the said clause in the conditions His action was dismissed in three instances The *Reichsgericht* admitted that in view of the *de facto* monopoly of the defendants and in view of the great economic importance of electric current, it would be an abuse of the principle of the freedom of contract and repugnant to the *gute Sitten* if the defendants were to impose unreasonable or inappropriate clauses on the electricity consumers. In this case, however, the plaintiff did not sue as a purchaser; he was not directly affected by the contracts in question, but only indirectly influenced by virtue of the decrease of his profits Therefore the Court had no power to interfere.

(*l*) RGZ 38 157 (February 5th, 1897)

(*m*) See, generally, Raiser, *l.c*, pp 283 *et seq.*, 299 *et seq*

(*n*) RGZ. 79, 229 (April 13th, 1912).

The following cases all deal with a limitation of liability clause (*o*). Two of them call for particular attention, as the German *Reich* in its private legal capacity was concerned. The administration of the *Kaiser Wilhelm Kanal*, the canal leading from the Baltic to the North Sea, required every master of a ship, before passing through the canal, to sign a declaration acknowledging the binding force of the regulations The material clause of them read as follows —" The German *Reich* is not liable to compensate damages incurred by ships while in the canal . even if the damage is due to the negligence of the canal pilot or of another officer of the canal administration " This clause was declared invalid as repugnant to the *gute Sitten* The owner of the canal held a *de facto* monopoly This he had abused by imposing unreasonable and inappropriate sacrifices on the general traffic, and by prescribing to the latter unreasonable and inappropriate conditions (*p*) A similar case occurred a few years later in the same canal (*q*) A ship was damaged, while being towed by a steam tug belonging to the *Reich*, through the negligence of the master of the tug The towage contract contained the following clause.—" The *Reich* shall not pay compensation for damages inflicted on a ship through the negligence of the tug's crew . while being towed by a steam tug belonging to the canal administration " The Court expressly upheld the principle laid down in the above mentioned decision, but it declared the clause valid. The tugs owned by the German *Reich* were not the only ones in the canal Nobody was forbidden to employ a tug other than those belonging to the *Reich* The reason why that rarely happened was the small charge made by the tugs in public ownership Besides, the master or owner of the vessel were always at liberty, in view of the low charges, to insure the vessel against damages incurred while being towed through the canal

(*o*) This clause is generally excluded in **Austria**: see § 1295 of the Civil Code, and decision of *Oberster Gerichtshof*, February 7th, 1933, S Z 15, 27, Z A. I. P. R., vol 9, p. 734

(*p*) RGZ 62, 264 (January 8th, 1906), cp. 20, 117 (February 11th, 1888)

(*q*) RGZ. 81, 316 (February 12th, 1913)

In a case where a transport undertaking excluded their liability, even when negligence was proved on the part of its principal officers, this clause was again declared invalid, as the firm had a *de facto* monopoly, and the exclusion of liability contained an abuse of this power, and was therefore contrary to the *gute Sitten* (*r*) The *Reichsgericht* does not stop short at this point. It lays down: A limitation of liability clause contained in a standardized transport contract may be invalid, even though the individual transport undertaking by itself is not a monopoly, but is a member of a group of carriers forming a *de facto* monopoly, and had agreed that the member undertakings should insert such clause in their general conditions However, the Court will invalidate such a clause only in very few and extreme cases, to which the one under consideration did not belong (*s*) Finally, the decision of the Court of Appeal of Baden, dated March 22nd, 1934, calls for separate discussion (*t*). What happened was this The plaintiff owned a small transport firm, the defendants were a very important factory in the district One day the defendants requested the plaintiff to call at the factory in order to inspect goods which he was ordered to transport On his arrival at the factory he was requested to sign a declaration whereby he waived all claims for compensation which might arise as a consequence of an accident in the factory. The plaintiff was in fact injured through the negligence of one of the defendants' servants, and brought an action for damages. The defendants pleaded the declaration, but it was held that in

(*r*) RGZ 102, 396 (October 1st, 1921), see 20, 115, 50, 402, 62, 266 In **U.S.A.** one goes further than this According to that law it is not only forbidden in such cases to contract out the negligence of principal officers of the undertaking, but equally that of all officers and servants See Raiser, *Kontrahierungszwang und Freizeichnung*, Z. A I P. R , vol 8, p 32, cp. the insurance agreed upon in transport conditions of 1927 *ibid* , p. 31. Incidentally the German attitude is also a result of the *Organtheorie* of legal persons, according to which the acts of the principal officers of such body are regarded as the acts of the body itself. This conception has also influenced English law through Lord Haldane's speech in *Lennard's Carrying Co., Ltd* v *Asiatic Petroleum Co , Ltd* , (1915) A C 705, 713 But it has not yet had any effect on the subject-matter of this work.

(*s*) RGZ 99, 107, 110 (May 15th, 1920), 103, 82 (October 26th, 1921); 106, 386 (March 21st, 1923).

(*t*) *Oberlandesgericht* Karlsruhe, *Juristische Wochenschrift*, 1934, 1510, No. 5.

this case the latter did not avail them. If the person waiving all future claims at the factory's request would have been a person visiting the place, but having no business to transact there, the clause would be applicable Here the facts were different The plaintiff was expressly invited to enter the factory for business purposes. "To decline business relations with the defendants could be disastrous for a small transport firm. Therefore, it must be regarded as an abuse of the defendants' economic power if they frame the conditions for the entering of the premises without regard to the needs of business in a selfish way It would be an abuse in the present case if the defendants should be permitted to plead the exclusion of liability Such exclusion is not in harmony with the *gute Sitten*" This, as well as most of the previous cases, would probably have been decided differently in England Especially in the last-mentioned case, "the paramount public policy of the freedom of contract" would have overruled all other considerations

(12) In spite of the similarity of both terms, the *ordre public* in **France** is more akin to the German *gute Sitten* than to English public policy (*u*) Indeed, French law is almost stricter than German law.

(a) Art 6 of the *Code Civil* provides "*On ne peut déroger, par des conventions particulières, aux lois qui intéressent l'ordre public et les bonnes moeurs*" From the manifold explanations only the following two have been selected in order to show what the article means The *ordre public* is described (*x*) as "*l'organisation considerée comme nécessaire pour le bon fonctionnement général de la Société* ." And the "*bonnes moeurs rentrent dans la notion de l'ordre public, car la Société est évidemment intéressée au maintien des bonnes moeurs et troublée par leur violation*" In fact the former term embraces the latter one, and the *bonnes moeurs* were only expressly mentioned

(*u*) An interesting case which is within the French *ordre public*, but contrary to English public policy, is *Kaufmann* v. *Gerson*, (1904) 1 K. B 591 (C. A.).
(*x*) G. Baudry-Lacantinerie, *Précis de Droit Civil*, vol 1, 14th ed. by Paul Guyot, 1926, p 49.

in the code in order to place this point beyond dispute (*y*). The learned English scholars who have expounded French law to Englishmen (*z*) emphasise that the French *bonnes moeurs* cover more ground than English "morality," which means practically sexual morality "It is not possible to give a precise definition of *bonnes moeurs*, but we may say with an old writer that they are the habits based on the general sentiment of duty, propriety and public decency" Under contracts against the public order fall "contracts which interfere with good government, or with the administration of justice, or the discharge of official duties, as well as various other classes of contracts, though not necessarily *contra bonos mores* in the sense explained above, are nevertheless held to be against public policy" The French and English explanations do not tally, but they make it clear that the above proposition is correct *Ordre public* and *bonnes moeurs* are together wider than public policy, both their function and their scope are more closely related to the German *gute Sitten* than to English "public policy."

(b) For this reason a detailed examination of the opinions of legal writers and of the case law would only embarrass the present discussion It is fairly obvious that standardized contracts have as much to fear from the combined forces of the *ordre public* and *bonnes moeurs* as from the German *gute Sitten*, and incomparably more than from English public policy

To begin with, conditions may be void if they are imposed by bodies exercising a monopoly, though the case law has not yet succeeded in establishing definite rules (*a*) The discussion seems to have centred primarily round conditions of public utility companies With regard to these organisations, the Courts have recognized their right to demand from their customers a minimum duration of the supply contracts The Courts are equally certain that the company cannot force

(*y*) Planiol and Ripert, *l c*, vol 6, pp 24 *et seq*, 308 *et seq*, 315 *et seq*. The Courts have also used the *cause* to invalidate obnoxious bargains

(*z*) Sir M Amos and F P Walton, Introduction to French Law, 1935, pp. 167, 168

(*a*) René Démogue, *Traité des Obligations en Général*, vol 2, No 621.

subscribers to hire gas meters or to renounce installations approved by the municipal authority in favour of the companies' devices In short, Démogue emphasises that "*on retrouve encore là la distinction des clauses utiles pour le bon fonctionement du service, et celles inspirées par le seul intérêt de la compagnie*" This distinction, it is submitted, constitutes an excellent test for the determination of what represents an abuse of monopoly, and it seems to have worked well in French Courts

An astonishingly great part of the discussion is taken up by the limitation or exemption of liability clause This clause seems to have excited considerable alarm, and it produced a large body of case law which was by no means unanimous (*b*). Perhaps the reason for this was the variety of those clauses Some would only limit liability and others wholly except it Some clauses would be restricted to negligent and others extend to intentional wrongs Finally, a number of exceptions and limitations would only apply to torts committed by servants, whereas another set also applied to the acts of the contractors themselves The uneasiness produced by those circumstances was particularly disturbing in respect of land transport, and the legislature intervened by annulling such clauses in a number of instances (*c*). The Act was widely welcomed, for it was said (*d*) that "*celui qui stipule une telle irresponsabilité, en réalité ne s'engage pas*," irrespective of the carriage being performed gratuitously or for remuneration. Still, the clause is not without effect; the majority of judicial decisions, by giving effect to the intention of the parties, construe the Act as merely shifting the onus of proof This attitude of the Courts is severely criticised by learned writers (*e*), but if one realises the important part played by the onus of proof in the trial of such an action it must be admitted that the customer will generally be adequately protected This protection, either by declaring

(*b*) Planiol and Ripert, *l c*, vol. 6, No. 399, Amos and Walton, *l.c.*, p 197.
(*c*) Loi de March 17th, 1905, amending sect 103 of the Code de Commerce, *Rec.* Sirey, 1905, p 945.
(*d*) Planiol and Ripert, *l c.*, vol. 6, p. 561 *et seq*
(*e*) *E.g*, Planiol and Ripert, *l c.*, vol. 6, p 563.

the clause altogether void, or only as effecting a shifting of the onus of proof, as the case may be, will also be granted in a suitable case, if the carrier, or any other undertaker, does not hold any monopolistic position Thus it was laid down in a recent decision of the Court of Cassation (*f*), in a case where a motor accident, which resulted in the death of the plaintiff's husband, and in herself being injured, was the subject of dispute, that the "victim of an accident cannot waive in advance his claim for damages resulting from a delictual fault", even the fact that the carriage was gratuitous did not alter the legal situation, and the clause was held void.

Likewise, the various exception clauses in charter-parties were the object of heated discussion in the Courts and among legal writers. Except for some dissentient local Courts, most of the clauses were judicially approved, though some writers fought bitter attacks against the decisions of the majority, particularly against clauses where liability was excluded not only for the torts of master and crew, but of the owner (*g*)

Quite apart from standardized contracts, both the Courts and legal literature are more readily inclined to regard statutory provisions as compulsory, though the statute does not expressly declare them incapable of being contracted out In doing so the judges and writers are guided by considerations of the *ordre public* and the *bonnes moeurs* (*h*)

(*f*) March 21st, 1933, *Rec.* Sirey, 1933, 1.232, Z A I P R, vol 8, p. 555.

(*g*) See the spirited and stimulating discussion by J. Bonnecase, *Traité de Droit Commercial Maritime*, 1923, Nos. 491 *et seq*, 519 "*Nous prétendons, en effect, que les clauses de non-responsabilité, aussi bien la négligence-clause que les clauses excluant la responsabilité des fautes personelles de l'armateur sont contraires à l'ordre public et que par suite le consentement des parties, serait-il réel, est impuisant à les rendre efficaces*" Cp A Wahl, *Précis Théorique de Droit Maritime*, 1924, Nos 12, 104, 196 *et seq*, 368 *et seq*, 427 *et seq*, 433 *et seq.*, 475, 515, 618 *et seq*

(*h*) An interesting example are the French building contracts Art 1792 of the Civil Code lays down a strict liability of the architect, and it is common opinion that this liability may not be contracted out. The same applies to shipbuilders under art 1386. see Planiol and Ripert, *l.c.*, vol 11, p. 207 This compares favourably with English law, where there is an implied warranty by the builder of a house that the latter should be inhabitable see *Miller* v *Cannon Hill Estates, Ltd*, (1931) 2 K. B 113 (Div Court), but contracting out is possible.

(13) **Italian** law on this point needs little comment, as its principles are the same as those of French law (*i*), and no important developments of private law have taken place since the revolution of 1922 (*k*). Reference will only be made to two fairly recent cases, where conditions in standardized contracts were declared void as contrary to the *ordine pubblico*, but on grounds foreign to what the conventional lawyer hitherto expected The Italian power stations for some time incorporated the following clause in their electricity supply contracts:—" For the benefit of the works it is agreed that during the currency of this agreement—ten years—the works shall have the exclusive right to supply the purchaser, and this not only with regard to the premises set out in the present contract, but also with regard to all premises which the purchaser shall build, acquire, or rent during the currency of this agreement, unless there already exists another obligation." The *Curia di Cassazione*, in its judgment dated February 19th, 1931 (*l*), declared this clause valid not only for its provisions as to time and locality, but principally because " such clause is apt to foster a sound electricity business, inasmuch as it secures a certain number of customers, and thereby enables the works to invest the necessarily large amount of capital required." The immense danger of this sort of reasoning is patent, and it is worth mentioning that two provincial Courts of Appeal, where the actions had been heard before both cases were reviewed together in the Court of Cassation, differed in their judgments, the one holding the clause favourable, the other unfavourable, for the development of sound economics in electricity.

(*i*) Ruggiero, *Istituzioni di Diritto Civile*, 3rd ed., 1921, vol 1, p. 288 The *ordine pubblico* and the *buon costume* correspond, generally speaking, to French law

(*k*) *Camera dei Deputati, La Legislazione Fascista*, 1922—1928; M Sarfatti, *De Obbligazioni nel Diritto Inglese in Rapporto al Diritto Italiano*, 1924.

(*l*) *Rivista di Diritto Privato*, 43, Z. A. I P. R., 1933, p. 684.

Chapter V.

THE INTERPRETATION OF STANDARDIZED CONTRACTS.

(1) Conditions in standardized contracts are subject to the construction by the Courts just like non-standardized contractual terms, and the rules of construction generally are too well known to call for any detailed discussion Only a few remarks might be in point as to the principal differences of those rules in the laws under consideration

(2) Perhaps the most striking difference between English and Continental law is the English law of evidence, which precludes the judge from using " extrinsic " sources of information No similar rules form part of any Continental law. As was said by a great Swiss and German lawyer (*a*), " whatever, from the application of *all* sources of information at the disposal of him who construes a declaration, follows as the real intention, shall be deemed to be the meaning of such declaration " The difference, however, does not often appear openly, as English law has developed exceptions to the extrinsic evidence rule which take the sting out of it for the majority of cases Moreover, in standardized contracts the rule will rarely apply It is the very idea of this kind of contract to merge all terms into the document so that this is the sole source of the *lex contractus*. Variations of individual clauses may not be rare, but they are, for all practical purposes, in writing, so that they, too, are part of the document. Only in exceptional cases, when an otherwise valid variation is effected orally, it might not be enforced in an English Court, contrary to Continental practice (*b*).

(*a*) A. v. Tuhr, *Allgemeiner Teil des Buergerlichen Rechts*, vol 2, p 538.
(*b*) *Jervis* v. *Berridge* (1873), 8 Ch. App. 351, *Erskine* v *Adeane*, *ibid.* p 756, *Rose and Frank* v. *Crompton*, (1925) A C. 445, 454 (*per* Lord Phillimore).

(3) There is another rule of construction where the relevant laws are at variance with each other. If contractual terms are ambiguous, and if neither the plain and literal meaning of the words nor the intention of the parties can make the term unambiguous, English Courts have a "supplementing power" (*c*) which enables them to attribute that meaning to the words which will make the instrument valid. *Verba ita sunt intelligenda ut res magis valeat quam pereat* (*d*). The same rule obtains in most other countries (*e*), but German law relies on this rule only for the construction of wills (*f*)

Again, under English law, if all means are in vain the Court will construe an ambiguous term strongly against the person using it (*g*) German doctrine, too, accepts this maxim (*h*) whereas French and Italian law as well as Spanish law, in case every other method has failed, also resort to the somewhat old-fashioned rule that the clause should be interpreted against the person in whose favour the clause is drafted, that is to say, against the creditor (*i*)

In all other respects the rules for the construction of contracts are the same in the relevant laws Everywhere the plain and literal meaning of the words, the intention of the parties, the whole contract, and local usage are the signposts leading the judge to ascertain the true purport of the agreement (*k*).

(*c*) Lord Wright, M R, Some Developments in Commercial Law in the Present Century, Presidential Address to the Holdsworth Club of the Students of Law in the University of Birmingham, 1935, p. 7.

(*d*) *Hillas & Co* v *Arcos, Ltd* (1932), 38 Com Cas at p. 36 *et seq*, and see Professor Chorley's remarks in 49 L Q R 319

(*e*) **France,** art 1157, *Code Civil*, **Italy,** art 1132, *Codice Civile*, Obrégon, Latin American Commercial Law, p 300, for **South America.**

(*f*) § 2084, *Buergerliches Gesetzbuch*, Schirrmeister-Prochownik, *Das Buergerliche Recht Englands*, vol. 1, p. 149.

(*g*) *Fowkes* v *Manchester and London Life Assurance Association* (1863), 3 B. & S. 917, 929, *per* Blackburn, J.; in general, see Leake's Law of Contract, p 158.

(*h*) Michel, *Geschaeftsbedingungen*, pp. 40—44

(*i*) *Code Civil*, art. 1162; *Codigo di Commercio*, arts 57—59; Z. A. I. P. R., vol 3, p 942.

(*k*) **France,** arts 1156, 1158, 1159, 1161, *Code Civil*, **Italy,** arts 1133, 1136. *Codice Civile*, **South America,** Obrégon, Latin American Commercial Law, p. 331.

(4) A more general reflection may be opportune before passing to the special problems of the subject-matter. It was said above that somewhat peculiar circumstances prevail in modern Germany. That country has entered on a new period of its legal history. The National Socialist catchword of the "totalitarian" State marks the desire to turn the whole idea of, and outlook on, life from individualism to collectivism. Strong inroads have already been made into the sphere of individual liberty. The effect of the new development on private law cannot yet be fully estimated. Still, the new philosophy has so penetrated all ranks of the community that in fact it cannot very well stop short of the judges Moreover, this philosophy demands that general clauses in the code, such as *bona fides* and conduct of life should be adapted to the new ideas They in fact have received a new interpretation, and this cannot be without repercussions on the treatment of standardized contracts.

(5) Having thus prepared the ground, it will now be convenient to consider the special principles which have been developed for the construction of standardized contracts These are few and far between That fact is somewhat astonishing. A phenomenon which has gained such outstanding importance in everyday life, and which has produced such momentous variations with regard to application and invalidity of contractual terms, ought, one would expect, to deserve also a special theory of construction Indeed, Saleilles, who in modern times first recognized the special character of the *contrats d'adhésion* (*l*), emphasized that standardized terms partook more of the nature of statutes than of contracts Consequently, he advocated that judges ought to construe such terms as they construed statutes (*m*). To do so would mean the almost complete elimination of the intention of the parties as a means of construction, not to mention the other differences between the construction of statutes and contracts, notably in Continental

(*l*) See above, p 36

(*m*) The problem is very well discussed by Raiser, *l.c.*, p. 253 *et seq.*

laws Indeed, a distinguished German lawyer, Dr Carl Ritter (*n*), is prepared to follow this course. He expresses himself in this way. "Construction and application of the General German Marine Insurance Conditions (*o*) must therefore follow the principles governing the construction and application of statutes . Thus, by beginning with the words of the provisions, one has to discover the meaning which their authors, or, if a statutory provision is concerned, the authors of the statute, wished to attribute to it, having regard to the given circumstances, the general social and economic ideas prevailing at the time of their creation, and the special view they took in order to balance conflicting interests" (*p*) However, judges and legal theoreticians almost unanimously declined to follow that lead, but the subject was too important to be completely ignored, and a number of modifications of the general law relating to the construction of contracts have found their way into the laws

(6) At a comparatively early date the **German** *Reichsgericht* evolved rules of adjective law which were designed to meet the case of some groups of standardized contracts, thereby assimilating to a certain extent statutes and contracts at least so far as concerned adjective law It must be borne in mind that the *Reichsgericht* has not to decide an "appeal," but a *Revision*. That means it is bound by the findings of fact by the lower Courts, and has merely to decide questions of law, somewhat similar (*q*) to the procedures in the English Court of Appeal and in the House of Lords If in an ordinary law suit the meaning of a contractual term is found by an inferior Court the *Reichsgericht* cannot go behind that finding, which is one of fact, unless the lower Court, in arriving at the finding, violated a rule of law.

Different considerations prevail when terms in standardized contracts call for construction. In that case the *Reichsgericht*

(*n*) *Das Recht der Seeversicherung*, vol 1, 1922, p 7, note 11

(*o*) About the special character of these conditions and their history, see above, p 24

(*p*) It should be noticed that on the Continent the utterances of the legislature are a good source for the discovery of the meaning of a statute.

(*q*) But the *Revision* is no re-hearing.

has independently developed rules which were not thought of by the written law If contracts are under consideration which are in use over a great part of Germany, particularly where an undertaking employing standardized contracts does business in more than one Court of Appeal district, the Supreme Court deviates from the general rule To adhere to the ordinary rule might have undesirable effects Suppose an insurance company does business all over Germany, and suppose one of the clauses in the policy form were ambiguous, and the District Court of Appeal for Brandenburg determined the meaning in one, and the District Court of Appeal for Silesia in another way If the findings of those Courts could not be reviewed by the Supreme Court, an uncertainty would exist with resulting inconvenience for the company and the policy holders, in case of any change of residence within the country This induced the *Reichsgericht* to differentiate between conditions (also standardized ones) of a limited importance, and so-called " typical contractual terms " (*Typische Vertragsbestimmungen*), which represent standardized conditions which are likely to be applied in more than one District Court of Appeal. The *Reichsgericht* attributes to the " typical " terms a quasi-legal character, which allows the Court to decide their meaning independently of the findings by local Courts (*r*). If it is not likely that terms will be reviewed in two or more appeal districts the Supreme Court will consider itself bound by the lower Court's decision (*s*).

(7) It follows from partly similar considerations that **French** Courts are inclined to construe standard terms more strictly and narrowly than ordinary terms, thus sometimes depriving them of much of their harshness (*t*), and the great **Italian** lawyer, Professor Cesare Vivante (*u*), stresses the imperative character of at least one set of contracts, the *tariffe* of the railways which

(*r*) RGZ. 81, 117 (December 13th, 1912), 135, 136 (February 5th, 1932); *Juristische Wochenschrift*, 1934, p. 346, No. 3 (October 17th, 1933), RGZ. 153, 62; *Juristische Wochenschrift*, 1937, p. 673 (November 20th, 1936).
(*s*) RG. in *Juristische Wochenschrift*, 1934, 2761 (July 4th, 1934).
(*t*) Perreau, in *Rev Trim.*, vol 26, pp 322—324.
(*u*) *Trattato di Diritto Commerciale*, vol 4, 1929, No. 2067.

exercise a public function. "They must," says Vivante, "be applied to the letter, because an extensive interpretation would entail the danger of sacrificing that perfect equality of treatment which the legislature desired to guarantee to all persons using the railways" (*x*)

In **England** that result is arrived at more naturally Under the law of this country every party to a written agreement contracts "to be bound in case of dispute by the interpretation which a Court of law may put upon the language of the instrument" (*y*) This rule, together with the principles of precedents, has produced a fairly uniform construction of standard conditions Where ordinary contracts are concerned, the judge should in general pay no attention to previous judicial pronouncements on similar clauses (*z*), but in standard contracts necessity has brought about a modification Thus in *Danneberg* v *White Sea Timber Trust, Ltd* (*a*), the question arose whether the icebreaker clause in a charter-party should be construed like a similar one in an earlier case (*b*) Branson, J , laid down these principles (*c*) "It seems to me that the proper way for me to approach the construction of this clause is to read the clause, forgetting, so far as one can forget, what has been said about the meaning of particular phrases which occur in this clause and also in other clauses if the expressions appear in so different a setting as to make it apparent, or even to make it probable, that a different meaning should be attached to them But where one finds a clause, or a group of words, which has been authoritatively construed in one of the other cases, then it seems to me to be my duty, as a judge of the first instance, to follow the construction put upon that language by superior

---

(*x*) See also Raiser, *l c* , p 251 *et seq* as to Germany

(*y*) *Per* Lord Watson, in *Stewart* v *Kennedy* (1899), 15 App. Cas 75, at pp 121—123 (H L —Sc).

(*z*) *Per* Jessel, M.R , in *Southwell* v *Bowditch* (1876), 1 C P D 374, 377 (C A.), *Aspden* v. *Seddon* (1875), L R 10 Ch. App. at p 397

(*a*) (1935), 51 Ll. L Rep 338, affirmed 53 Ll L Rep 99

(*b*) *Ugleexport Charkow* v *Owners of SS Anastassia* (1934), 39 Com. Cas 238, 50 T L. R. 361, 49 Ll L Rep 1 (H. L)

(*c*) 51 Ll L Rep at p 344

Courts, unless I can see that the reason for the putting on of that construction in the previous cases does not exist in the present case." This judgment was affirmed by the Court of Appeal, and after the judgment in that Court had been delivered the appellant asked for leave to appeal to the House of Lords. This was refused, and Lord Wright, M.R., said (*d*). "This is a particular charter-party We have no indication that precisely this type of clause is to be found in any other charter-party. The House of Lords has pronounced its views on the construction of a charter-party which does not appear to differ either in principle or in substance from this particular charter-party." (*e*)

(8) We now turn to one or two special matters to be noticed, particularly in connection with the present research First, the *contra proferentes* construction may be mentioned. This is the last one the judge should resort to, and it can only apply if a clause is capable of two meanings, and the "lay" party could reasonably expect the clause in the meaning more favourable for it Originally the rule is meant for cases where the words of the contract are the actual words of the parties, but it is also resorted to if a business undertaking incorporates in its contracts conditions which were drafted by the trade association By the rule the lay party is to be protected, and it cannot be applied invariably against the undertaking issuing the form. Exceptional cases are likely to happen in marine insurance, and Maugham, L.J. (as he then was), laid down in *A/S. Ocean* v *Black Sea and Baltic General Insurance Co., Ltd.* (*f*)· "In such a case as the present there would be no reason, if the clause were ambiguous, for construing it against the underwriter and in favour of the assured For my part I should be inclined to agree that in a marine policy, since such policies are framed in accordance with

(*d*) (1935), 53 Ll L. Rep 99, 113.

(*e*) Similar cases happen often mainly in commercial and shipping matters. See, *e.g.*, "ready to load" and "in regular turn". *United States Shipping Board* v. *Strick* (1925), 41 T L R. 201 (C A.), (1926) A. C. 545 (H. L.); *Leonis Steamship Co., Ltd.* v. *Rank, Ltd.*, (1908) 1 K. B. 499, 24 T. L. R. 128 (C A.).

(*f*) (1935), 51 Ll L. Rep 305, 310, see also Greer, L.J., at p. 307.

a slip prepared by the assured's broker, the proper course is to adopt the principle suggested by the late Sir Arthur Cohen in his valuable article on Marine Insurance contained in Vol 17 of Halsbury's Laws of England, s 688, at p 347 He says there ' Finally, where an ambiguity cannot be removed by any other rule of construction, the maxim *verba chartarum fortius accipiuntur contra proferentem* is applied; it being, however, left for determination in each case, as regards any special provision in the policy, whether the insured or the insurer are to be considered the *proferentes* within the meaning of the rule ' In the present case, having regard to the fact that the clause which is alleged to be ambiguous is contained not in the printed form of the policy, but in an addition in typescript added to the policy, I am of opinion that there is no reason in this case for coming to the conclusion that the underwriters are the *proferentes*, and accordingly I think there was no room for the application of that principle "

Where there are no such exceptional circumstances the ordinary rule prevails It has been expressed mainly with reference to the law of insurance In a number of cases the point at issue is whether the statement in the proposal form only constitutes a description of the risk or whether it amounts to a warranty In the absence of a statement to the contrary the declaration shall only be taken as a description of the risk, thus allowing the assured an occasional use or act other than that which was stated in the proposal (*g*) Also, in case of other ambiguities in insurance policies, the construction against the insurer who issued the conditions which the assured might reasonably understand in a sense favourable to himself has been either tacitly adopted or strongly emphasized for over a century (*h*)

(*g*) *Dawsons, Ltd* v *Bonnin and Others*, (1922) 2 A C. 413 (H. L.—Sc.), *Provincial Insurance Co , Ltd* v. *Morgan* (1932), 48 T L R 217, (1933) A C. 240 (H L.), *Farr* v *Motor Traders' Mutual Insurance Society, Ltd* , (1920) 3 K B. 669 (C A.)

(*h*) *Dobson* v. *Sotheby* (1827), Moo & Mal. 90. *Shaw* v *Robberts* (1837), 6 A. & E 75, *In re Etherington and the Lancashire and Yorkshire Accident Insurance Co., Ltd.*, (1909) 1 K B 591, 596. *In re Bradley and Essex and Suffolk Accident Indemnity Society*, (1912) 1 K. B 415 (C A); *Kaufmann* v

(9) The **German** reports reveal a greater variety, though insurance provides the more important cases The principle that clauses in policies should be construed against the insurer is followed several times (*i*), but the most interesting case is the following one (*k*) A policy was taken out for an aeroplane with the proviso that the risk should not attach before the plane should have passed the test flight (*Typenflug*). It was destroyed during the third flight, and the insurer declined to compensate the owner. He contended this very flight had been the test flight, so that the risk had not yet attached. As against this the assured alleged that the second flight had been the test flight, and he contended that the risk had attached after the second landing Evidence on the meaning of the word *Typenflug* was produced on which the Court found that there was a difference of opinion between the parties as to the meaning of the word. The insurer believed it to signify a flight consisting of two curves, and the assured was of opinion that a straight flight was meant Experts explained that the expression *Typenflug* was a new one, and did not allow of a concrete definition. The *Reichsgericht* held that this was a case of latent *dissensus* (sect. 155 of the Civil Code), and that no contractual obligation had come into existence as between the parties The rule that ambiguous terms ought to be construed *contra proferentes* only applied if there was at least a consent with regard to the subject-matter; there was no operation of the rule where no contract existed Therefore the action for the payment of the sum insured was dismissed. The *Reichsgericht* adds a rather surprising deliberation According to the evidence no definite meaning attached to the term *Typenflug*, distinguished experts differed on that point. Therefore, "it would have been the duty of the plaintiff, before she entered into an insurance contract

---

British Surety Insurance Co (1929), 45 T L. R 399, *per* Roche, J , *Condogianis* v *Guardian Assurance Co , Ltd* , (1921) 2 A C 125, 130 (J C), *Bradbury* v. *London Guarantee and Accident Co , Ltd.* (1927), 40 C L. R 127

(*i*) RGZ. 120, 18, 134, 148; see also RG in *Juristische Wochenschrift*, 1937, p. 874, RGZ. 153, 147 (December 8th, 1936)

(*k*) RGZ. 116, 274 (March 11th, 1927).

commencing 'after the *Typenflug,*' to make sure what the defendants meant by this expression, and to form a conclusion according to the information obtained." One might infer from this *dictum* that even if a contract had existed between the parties the *Reichsgericht* would have equally been inclined to dismiss the action owing to the exceptional circumstances of the case.

Some doubt may be expressed about the correctness of the decision of the Provincial Court of Appeal at Breslau of January 28th, 1933 (*l*). There an accident insurance policy contained a clause excluding the insurer's liability if the accident happened "while using a motor cycle as a driver or *Beifahrer*" (a term comprising the pillion-rider and the side-car passenger). The assured was injured while riding on his bicycle, but holding on to and being pulled by a motor cycle. The insurer contended that this amounted to using the latter vehicle as a *Beifahrer* within the proviso of the policy, and the Court accepted this construction This decision is open to the criticism that the term *Beifahrer* certainly did not include the assured's conduct, and in the absence of an express indication to the contrary, the insurance company ought to have been held liable.

The *contra proferentes* rule is also applied to conditions of shipping companies (*m*), banks (*n*), and land transport undertakings (*o*). However, if it is proved that both parties are, or ought to be, equally familiar with the printed conditions, the *contra proferentes* rule is inapplicable Thus, where the defendant was a customer and a director of the plaintiff bank, it was held that the defendant knew very well what the clause in question meant, and that the *contra proferentes* rule could not be relied on by him (*p*).

(*l*) *Juristische Wochenschrift*, 1933, p 1420, No 3
(*m*) Hamburg Appeal Court, *Seuffert s Archiv*, 71, 17 (July 21st, 1917).
(*n*) *Juristische Wochenschrift*, 1927, 1356 (RG February 22nd, 1929)
(*o*) RG. *Hanseatische Rechts-und Gerichtszeitschrift*, 1931, B. 147
(*p*) *Juristische Wochenschrift*, 1927, 1356.

(10) In **France,** too, ambiguities in insurance contracts are generally decided against the insurer where the latter drafted the clause (*q*), and the same applies to many other laws (*r*).

Inconsistency.

(11) Another problem which often arises in connection with standardized contracts is the inconsistency between two clauses in the same instrument. Very often the same contract contains printed and written clauses at the same time which are inconsistent with each other. For such cases there is a definite rule of law in England As early as 1803 Lord Ellenborough laid down, in *Robertson* v. *French* (*s*), that the printed language in a policy of insurance is "invariable and uniform (and) has acquired from use and practice a known and definite meaning, and that the words superadded in writing . . . are entitled . . to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formula adapted equally to their case and that of all other contracting parties upon similar occasions and subjects" (*t*). The principle was quite recently restated by Porter, J , in connection with a timber sale contract (*u*). In that case a printed c.i.f. form was used with a clause to the effect that the buyers were bound to accept a short quantity actually shipped, but were entitled to claim compensation in respect of the short delivery. Superadded was a typed clause providing

(*q*) Planiol and Ripert, *l c* , vol 11, p 588, Perreau, *Rev Trim* , vol 26, pp. 324—326, see also Planiol and Ripert, *l c* , vol 6, p. 160, generally.

(*r*) **Spanish** Civil Code, art 1288, **Swiss** Law of Obligations, arts 24, 25; see *Entscheidungen des Bundesgerichts*, 1933, II , 318, Z A. I. P R , vol. 8. p. 796, Contracts of Insurance Act, § 3, **Greek** Draft Law of Obligations, art. 79, Z A. I. P R , vol. 10, pp 53, 58, based on French law

(*s*) (1803), 4 East, 130, 136

(*t*) The rule was continuously followed *Joyce* v *Realm Marine Insurance Co.* (1872), L R 7 Q B 580, 583, *Glynn* v *Margetson & Co.*, (1893) A C 351, 357, *per* Lord Halsbury, L C , *Kaufmann* v *British Surety Insurance Society, Ltd* (1929), 45 T L R 399

(*u*) *Hollis Bros & Co., Ltd.* v. *White Sea Timber Trust, Ltd* (1936), 56 Ll. L. Rep 78, 3 All E R. 895

that the contract was "subject to sellers making necessary chartering arrangements . . . and sold subject to shipment, any goods not shipped to be cancelled" There was a substantial short delivery, and the buyers claimed compensation under the printed clause. Porter, J., held that the typed clause in effect conferred an option on the sellers whether or not they wished to deliver, and that this option was inconsistent with the obligation contained in the printed clause The learned judge laid down the law in this way. Where there was a contract "with both printed and written words the Courts must so far as possible give a meaning to both, but if it was not possible to give effect to both, the written words must prevail and the printed words must be discarded." In this case it was impossible to reconcile the printed and typed words, and the latter must prevail. If words are obviously left in the printed form by inadvertence, and inconsistent with the written words superadded to the contract, the Court will reject the former ones without first trying to give a meaning to both (*x*).

French (*y*) and German (*z*) law corresponds to that of this country, and do not call for any special discussion.

(12) Closely connected are cases where a printed clause is obviously inconsistent with the facts. Where, for example,

(*x*) *Dudgeon* v. *Pembroke* (1877), 2 App. Cas 284 (H. L.), where a time policy was written on a printed voyage policy, and the printed words "at and from" and "for this present voyage" had not been erased, *Western Assurance Co of Toronto* v *Poole*, (1903) 1 K B 376, *Law and Bonar, Ltd* v *British American Tobacco Co*, *Ltd*, (1916) 2 K B 605, where Rowlatt, J, held that a printed (1) clause in a c i f contract declaring the goods to be at seller's risk until delivery was inapplicable Equally, where a sue and labour clause in a policy on goods was not struck out after an indemnity policy had been engrafted on it, Walton, J, held in *Cunard S S Co*, *Ltd* v *Marten*, (1902) 2 K B. 624, 629, that that clause did not apply.

(*y*) Planiol and Ripert, *l c*, vol. 6, p 587. Perreau, *Clauses Manuscrites et Clauses Imprimées*, *Rev Trim*, vol 26, pp 316—322

(*z*) *E g*, Prov Court of Appeal Celle, *Seuffert's Archiv* 71, 230, RG. *Juristische Wochenschrift*, 1933, 1453, No 1. A rather nice question arose in another instance RG February 20th, 1929, *Hanseatische Rechts-und Gerichtszeitschrift*, 1929, A 288, a time policy and another policy were taken out, the former stipulating French, the latter Italian law, the second policy had also a written clause subjecting this policy to the conditions of the first one. It was held that this written clause had precedence over the printed conditions of the second policy, and that Italian law was therefore ousted, and French law prevailed for both policies

a re-insurance contract was grafted on an ordinary fire insurance policy incorporating among all terms of the latter a clause providing for actions to be commenced within twelve months after the fire, the Judicial Committee held that this clause did not fit in with the facts of the case and was inapplicable (*a*). Likewise, where the port of Londonderry *primâ facie* might have been read into the charter-party as a safe port, but where in fact it was not safe for the ship in question, as tugs had to be brought all the way from the Clyde, Roche, J. (as he then was), held that Londonderry was not included. If the printed conditions obviously do not suit the facts of the case they cannot be held applicable (*b*).

International Clauses.

(13) One last point remains with regard to the interpretation of standard terms, the international aspect of the matter It is common knowledge that a great number of clauses, principally in contracts for the sale of goods, are not peculiar to any one country. Furthermore, recent years have produced a number of conventions with regard to shipping and air carriage the individual clauses of which are bound to come up in the Courts of various countries. The problem facing lawyers and business men is: How are those Courts going to construe such clauses ? Now the preceding pages have, with very few exceptions, revealed a rare and laudable unanimity of the different laws as regards the canons of construction (*c*). Unfortunately the problem does not end there. The construction of clauses is

(*a*) *Home Insurance Co. of New York* v. *Victoria-Montreal Fire Insurance Co.*, (1907) A. C 59 (J. C)

(*b*) *Broström & Son* v. *Dreyfus & Co.* (1932), 44 Ll L Rep 136

(*c*) The picture is a very different one in respect of the interpretation of statutes. See R. A Eastwood, A Plea for the Historical Interpretation of Statute Law, Journal of the Society of Public Teachers of Law, 1935, pp. 1, 7; Sir Maurice Amos, The Interpretation of Statutes, 15 Camb. Law Journal, 163 (1933), D L. Llewelyn Davies, The Interpretation of Statutes in the Light of their Policy by the English Courts, 35 Col L. Rev. 519 (1935). Even where statutes and canons of construction are identical the result may be different. See *Grant* v. *Australian Knitting Mills, Ltd*, (1936) A C. 85, 52 T. L. R. 38, where the Australian Court of Appeal and the Judicial Committee took different views of sect. 14 of the Sale of Goods Act.

bound up too much with the general conduct of business, with political and economic conceptions, and with the philosophy of life to allow of uniformity. Still, such uniformity would benefit all persons concerned in international trade. This feeling was voiced quite recently by Lord Wright, M.R., with regard to the gold clause which has crept into so many sales of goods, loan, and membership agreements (*d*). "The gold clauses in bonds and obligations are very common in international contracts and in every part of the world. It would be a very serious matter if contracts of that character were treated by particular Courts as having a different meaning in the absence of language and surrounding circumstances of a decisive character compelling that conclusion. The construction of such commercial clauses ought to be so far as possible uniform, unless there are the strongest considerations involving a different construction" (*e*). Still, we are far removed from that ideal. Let us take such common clauses as f o b and c i.f F.o.b. means in England free on board, and in U S.A. free on rail. The American clause f o b vessel tallies with the English f o b. (*f*) Indeed, American business men are aware of this discrepancy and, when dealing with British merchants, sometimes quote f o.r (free on rail) so as to avoid misunderstandings. Furthermore, in U S A., Belgium, Denmark, Italy, Japan, the Netherlands, Norway, and Sweden the c.i.f clause obliges the buyer to pay freight not paid by the seller, the said freight being subsequently deducted from the amount of the invoice; no such obligation on the part of the buyer exists in Great Britain (*g*).

(*d*) *International Trustee for the Protection of Bondholders* v. *The King* (1936), 53 T. L. R. 64, 69, while discussing its treatment in U S A. and in the Permanent Court in the Hague; 56 Ll. L Rep. 59; 155 L T 591. This statement has not lost its value, though the decision itself has been reversed by the House of Lords (1937), 53 T L R. 507

(*e*) See also Lord Macmillan's powerful plea for a construction on broad general principles of internationally approved terms, free from antecedent precedents, in *Stag Line, Ltd.* v. *Foscolo, Mango & Co., Ltd.*, (1932) A C. 328 (H. L.).

(*f*) L. Maguier, *La Chambre de Commerce Internationale*, 1928, p. 119; Trade Terms (Int. Ch of Com. 68), comparative table

(*g*) Trade Terms, p. 24.

The endeavours of the International Chamber of Commerce to agree on uniform meanings of international terms have not been entirely successful, because British and Italian Chambers of Commerce did not see their way to accede to the draft by recommending to their members its incorporation in contracts (*h*).

The same is true as regards the law. The *Code Civil* prevails both in France and Belgium, yet the Courts of those countries have sometimes placed a different construction on its provisions (*i*). Where English law is applied in Dutch Courts difficulties exist as to its application (*j*). It is hardly possible to investigate the different constructions placed on the York-Antwerp Rules in domestic Courts. No sufficient set of decisions on identical or comparable facts is so far available, but one can gather already that divergent views will be pronounced, and that it will be extremely difficult to arrive at an uniform construction of international clauses (*k*).

This situation has already produced some doubts as to the practicability of an uniform law of sale of goods which has been in preparation for some time under the auspices of the International Law Association (*l*). One of the most controversial points in that proposal is the question of the passing of the risk (*m*). Even if those difficulties were overcome it would still remain uncertain if the domestic Courts, uncontrolled by an international tribunal, would preserve such uniformity for any considerable period. The German *Reichsgericht* has recognized this existence

---

(*h*) Incoterms, 1936, International Rules for the Interpretation of Trade Terms, International Chamber of Commerce, Brochure No 92

(*i*) J P Durand, *Le Droit des Obligations dans les Jurisprudences Française et Belge*, 1933, see Esmein, Z A. I P R, vol 8, p 588

(*j*) M. J. Mesritz, English Law in Dutch Courts, Journal of Comparative Legislation, vol 15, 1933, p 89 *et seq.*

(*k*) Roche, J., in *Vlassopoulos* v. *British and Foreign Marine Insurance Co, Ltd.* (1928), 31 Ll L Rep 313, (1929) 1 K. B. 187, on the one hand, and of the *Cour de Cassation, Req*, June 10th, 1929, *Rec* Sirey, 1 363, *Cour de Cassation Civile*, March 5th, 1935, *Rec* Sirey, 2 164, and the annotations to the French decisions on the other hand The difference between French and English practice with regard to the York-Antwerp Rules is also alluded to by Rowlatt, J., in *Wetherall & Co, Ltd* v. *London Assurance* (1931), 36 Com. Cas 181, 186.

(*l*) Rabel, *Recht des Warenkaufs*, 1936

(*m*) Grossmann-Doerth, *Ueberseekauf*, 1930, p. 92, G. Eisser, *Gefahrtragung beim Kaufvertrag*, 1927, p 45.

of manifold circumstances which stand in the way of all uniform contractual terms. In a recent decision (*n*) the defendant contended that where the "usual Leningrad Ice Clause" in a charter-party was in dispute, it was unnecessary to determine the proper law of contract, inasmuch as this was an international clause which was uniformly construed The Court, however, thought that even if that were so the proper law must be first ascertained.

Probably on account of those difficulties the Warsaw Convention concerning the Contract of Carriage by Air, 1931, does not attempt to ensure an uniform construction of its provisions. At several places in the Convention it is laid down that the domestic rule of law shall be employed in the construction of the international Convention (*o*)

Apart from those difficulties, the difference of the general laws produces, sometimes almost unnoticed, an *impasse* The arbitration clause in international sales might serve as an example Under English law, if a term amounting to a condition, as opposed to a warranty, is broken, the whole contract goes, and with it the arbitration clause Thereby the clearly expressed intention of the parties is defeated. Continental laws, on the other hand, maintain the contract in spite of the broken condition, and the arbitration can proceed Thus in international sales identical arbitration clauses have a different effect, according to whether the proper law of contract is English or one of the Continental laws. This state of affairs makes it imperative to inquire briefly into the treatment which standardized contracts have received in international private law

---

(*n*) *Seuffert's Archiv*, 88, 1 (November 4th, 1933)

(*o*) Art 20, § 1 (4) "If the carrier proves that the damage was caused or contributed to by the negligence of the party suffering damage, the Court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability" Art. 22, § 4 (1) "Actions must be brought before the Court of the carrier's principal place of business. The national law of the Court seized of the case shall apply" Art 23, § 2 "The method of calculating the period of limitation, as well as the reasons for suspension or interruption of the period of limitation shall be determined by the law of the Court seized of the case Art 24 "Where in any country legislative provisions conflict with these conditions of carriage the latter shall be applicable only in so far as they do not conflict with such legislative provision

Chapter VI.

CONFLICT OF LAWS.

(1) This subject is one of considerable complexity so far as the general law of contracts is concerned, and it is not proposed to discuss the general rules applicable to international contracts. The present inquiry is restricted to the question: Have any special rules been developed with regard to the proper law of standardized contracts? As a matter of fact, conflict of laws does not enter into disputes over such contracts as often as one might be inclined to think. If disputes arise concerning international sales, an arbitration Court will in many cases have the first and last word, and those tribunals do not trouble to inquire into domestic laws (*a*). Moreover, important forms in various trades prescribe one domestic law as the law of the contract. However, this practice is not universal, and principles of public policy often let in questions of international private law against the will of the parties.

(2) It is not surprising that the development of conflict rules for standardized contracts goes hand in hand with the evolution of such a doctrine in domestic law. Consequently, in England no comprehensive theory has yet been evolved, but some rules have grown up in connection with certain classes of contracts. The question of the proper law was principally discussed with regard to contracts of affreightment. Charter-parties are generally said to be governed by the law of the flag unless the contrary is stipulated, but it is doubtful how far this applies to bills of lading (*b*). The law of the flag has nothing to do with

(*a*) Grossmann-Doerth, *Ueberseekauf*, p 85.

(*b*) Dicey, Conflict of Laws, 5th ed by A. B Keith, 1932, rule 166, exception as regards customs of the ports, J. A. Foote, Concise Treatise on Private International Law, 5th ed by H H L Bellot, 1925, pp 428, 435, Halsbury, Laws of England, Hailsham ed., vol. 6, p. 269.

standardized contracts in general, and the presumption is now of diminishing importance by virtue of the international sea and air carriage conventions (*c*). Moreover, it appears that recent cases have not required anything like an express stipulation to displace the law of the flag. This happened, for example, in a case where the contract was made in Egypt, the charter-party signed in London, and the bill of lading was in the form of the General Produce Black Sea, Azoff and Danube Steamer bill of lading, 1890, with the usual English exceptions. Here Langton, J., held that the convenient thing for the parties would be to deal with the facts according to English law (*d*). With reference to this and other cases, Sir Boyd Merriman, P., laid down the law as follows (*e*).—"As regards the contract of affreightment as a whole, there is no necessary presumption that the law of the flag applies. I can well imagine that if the parties in this case had been in a position to form an actual intention as to the law to govern their contract, the sensible shipowner would almost inevitably have stipulated that his rights and obligations in connection with the receipt, carriage and delivery of the cargo or the payment of the freight, should be the same in the two contracts formed, respectively, by the charter-party itself and by the bills of lading incorporating the relevant clauses of the charter-party. Nor in the circumstances of this case can I see any valid reason which would have induced the indorsees of the bills of lading to dissent from that proposal." Therefore, the law of the flag, which was in this case the law of Yugoslavia, was rejected. The learned President expressed the opinion that English law was applicable as the law which the draftsman of the forms had in mind when he drafted the forms, but that question was not open for decision (*f*).

(*c*) Cheshire, Private International Law, 1935, p. 196.

(*d*) *The Adriatic*, (1931) P. 241, *sub nom Mitchell and Polnauer* v. *Behrend & Co*, 40 Ll. L. Rep. 350.

(*e*) *The Njegos (1936)*, 53 Ll. L. Rep. 286, 298.

(*f*) See also *The St. Joseph* (1933), 45 Ll. L. Rep. 180, *per* Bateson, J., *Jones* v. *Oceanic Steam Navigation Co., Ltd.* (1924), 19 Ll. L. Rep. 249, 348, *per* Lord Hewart, C.J., which seems to indicate a similar view though the cases are not conclusive.

Thus it would seem that in contracts of affreightment the standardization of contracts is now evidence of the relevant law, though it would be incorrect to say that they give rise to any presumption. As regards marine policies the law of the flag is immaterial (*g*), and it would appear that here, as well as in other insurance cases, the law under which the policy was drafted is usually decisive (*h*) Where, however, a re-insurance contract was made without any policy the ordinary contract rules prevailed (*i*).

All this is subject to English public policy. Where a Government contracts a loan in a foreign country and issues bonds, it was thought that the law of the Government applied (*k*); but this view did not commend itself to the House of Lords (*l*). On the other hand, if the parties once choose to act under a foreign law, the question of validity or invalidity of any act will be determined under the aspect of the foreign law, irrespective of what national Court is called upon to decide the case (*m*)

(3) In view of the fact that it was the **French** doctrine which first recognized the importance and the singular and special nature of contracts made under printed conditions, it is perhaps not surprising that we also find the clearest exposition of the principles of conflict of laws with regard to this matter in France. Under the heading *offres réglementées*, Professor A Pillet (*n*) gives a lucid description of offers emanating from large undertakings, principally insurance, sea, and land transport, &c In

(*g*) Halsbury, Laws of England, Hailsham ed , vol 6, p 269

(*h*) Halsbury, *l c* , Porter, *The Laws of Insurance*, 8th ed by T W. Morgan, p. 415 *et seq* , the cases cited by Porter are, however, not quite conclusive

(*i*) *Maritime Insurance Co* v. *Assekuranz-Union* (1935), 52 Ll L Rep 16, *per* Goddard, J

(*k*) *International Trustee for the Protection of Bondholders, A. G* v *The King* (1936), 53 T L R 64 (C A)

(*l*) *S. C* (1937), 53 T L R 507 (H L)

(*m*) Cheshire, *l c.*, p 197, Nussbaum, *Deutsches Internationales Privatrecht*, 1932, pp. 239, 244, Swiss *Bundesgericht*, vol 38, II , p 731 (July 12th, 1912); Austrian *Oberster Gerichtshof*, in *Rechtsprechung*, 1927, p 17 (December 1st, 1926), Commercial Courts of Luxemburg, Clunet, *Journal du Droit International*, 1931, p 229 (March 8th, 1930)

(*n*) *Traité Pratique de Droit International Privé*, vol. 2, 1924, No 499, p. 207 *et seq*

those cases there is, the learned author maintains, no intention of the parties; there is only an intention of one party. The other party possesses no liberty. He must contract or desist If he does contract, the law of the offeror, more particularly the law prevailing at the offeror's residence or place of business, is the law governing the contract (*o*). French law differs from English law also in another respect. It was laid down in *The Tornı* (*p*) that the parties, by agreeing on the application of a foreign law, could not escape compulsory provisions of the proper law of contract In France it appears that if once a foreign law has been agreed upon the validity is decided solely according to that law, and the French *ordre public* is of no effect. The rule was even used to evade the French provisions forbidding arbitration tribunals, a rule which was only recently modified (*q*) The intention of the parties, not the objective law, is supreme (*r*)

(4) Turning to **German** private international law the situation is more complex The previous chapters may have shown that as regards standardized contracts in general German law stands somewhere between English and French law, though it is much nearer the latter That is also the case with regard to the treatment of such contracts in private international law. German law is beyond the English stage of tentative efforts, but has not quite reached the French one of complete recognition

Before dealing with these matters it would seem advisable to settle one preliminary point. As standardized contracts are conditional on a certain measure of freedom of contract, the question arises. Are there any restrictions on this freedom with respect to the choice of a particular law ? In Germany the majority of bank, insurance and carriage conditions prescribe the law of the form (*s*).

(*o*) *Ibid*, p 211. (*p*) (1932) P 27, affirmed C A, p 78

(*q*) J P. Niboyet, *Manuel de Droit International Privé*, 2nd ed by Pillet and Niboyet, 1928, No 688, p. 799 *et seq*

(*r*) See art. 9 of the preliminary provisions of the *Codice Civile* of Italy, which follow the doctrine of Mancini.

(*s*) W Haudek, *Die Bedeutung des Parteiwillens im internationalen Privatrecht*, 1931, p 104 *et seq*

Now the attitude of German Courts oscillates as to whether or not they ought to allow an unrestricted choice. The bulk of legal authors, and a number of important decisions of the *Reichsgericht*, are of opinion that such choice is limited by the compulsory provisions or public policy of the law in whose territory the contract is made (*t*). However, so great an authority in the field of private international law as Professor Hans Lewald admits regretfully that the *Reichsgericht* in the majority of cases, and particularly in modern decisions, inclines to the more lenient attitude of allowing the parties almost complete autonomy as regards the choice of the law (*u*).

Generally speaking, the problem does not often enter into standardized contract cases, to the discussion of which we now propose to turn. It is recognized that it would be most convenient to let contracts be governed by the law of the country which produces the form (*x*). Indeed, German decisions go that way. Thus, where a ship was chartered in Norway, and the parties were Norwegian and German, but an English charter-party was used, English law was applied (*y*), and where a La Plata Corn Contract of the London Corn Trade Association was entered into between an Argentine and a German firm, English law was again held to govern the legal relations of the parties (*z*). Where, however, a document in common form uses individual expressions belonging to a foreign law, the expressions will be construed according to that law, but the relations in general will be dealt with according to the proper law. Thus, where German law as the *lex loci solutionis* was

---

(*t*) Lewald, *Das Deutsche Internationale Privatrecht*, 1931, pp 199, 202, where it is also mentioned that Swiss law is based on the same ideas; see Nussbaum, *l.c.*, p 243 *et seq.*

(*u*) Lewald, *l c*, p 203. recent political developments do not seem as yet to have changed this situation.

(*x*) Grossmann-Doerth, *Ueberseekauf*, p 86, Frankenstein, *Internationales Privatrecht*, vol. 2, 1929, p 173, asserts that this is the law.

(*y*) RG. in *Seuffert's Archiv*, 88, 1 (November 4th, 1933).

(*z*) RGZ. 93, 166 (June 8th, 1918), Nussbaum, *l c.*, p. 227, with other examples; and see *Deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts*, 1929, No. 32, RGZ 122, 233 (German marine insurance policy); 1931, No 37 (German fire policy covering land in Memel), 1932, No. 30 (insurance), 1933, No. 21, Lewald, *l.c.*, p. 220.

applicable to a contract of affreightment, typical English clauses in the bill of lading were construed separately according to English law (*a*).

Just as in domestic cases, the *Reichsgericht* holds itself entitled to depart from the findings of the lower Courts concerning the intention of the parties where " typical conditions " are under consideration (*b*), though it is bound by such findings as to the construction of clauses in foreign countries. The use of foreign forms is not conclusive, and will not by itself oust another law, if all the other circumstances of the case furnish paramount evidence to the contrary (*c*), a number of perhaps not quite so recent decisions exist where the standard form as such was disregarded and the intention of the parties was deduced from other evidence (*d*).

Thus the common form has almost won the day as a determinative factor, and Professor Lewald believes that it will soon be recognized absolutely (*e*)

(4) Recent developments on the other side of the Atlantic furnish a suitable conclusion to this chapter The Pan-American Code of Private International Law, which was finally approved by the sixth Pan-American Conference held at Havana in 1928, states, in art. 185, that in case of contracts of " adhesion " there is a presumption in favour of the personal law of the party which offered and prepared them The Code is in force between Brazil, Costa Rica, Cuba, the Dominican Republic, Guatemala, Haiti, Honduras, Nicaragua, Panama, and Peru. North American lawyers took part in the discussions and approved of the Code, and it is hoped that the remaining South American States and the U.S A. will adhere to it before long (*f*).

(*a*) *Deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts*, 1929, No 32, No 63 (Hamburg Appeal Court), Nussbaum, *l.c.*, pp 227, note 3, 229, 242

(*b*) About " typical " conditions in Germany, see above, p 124, G. Melchior, *Internationales Privatrecht*, pp 514, 518 (*c*) Nussbaum, *l c*, p 229.

(*d*) Lewald, *l c*, p 220, see also Memel Court, Z. A I P. R, vol. 10, p. 142 *et seq*, decision of September 26th, 1934 (English charter-party, French buyer, Danish flag, held: Memel law governed the contract, as it was concluded there, the shipment occurred in that place, and the voyage started from that harbour) (*e*) *L c*, p 221.

(*f*) Lorenzen, 4 Tulane Law Review, 499 *et seq*, 501, 516, 518 (1930).

Conclusion.

TRADE-MADE LAW OR STATE-MADE LAW ?

(1) This, then, is the law relating to standardized contracts. It remains to make one or two general reflections with regard to them First, as to their nature This has been debated primarily in Germany The question has been asked whether their true nature is contractual or whether they are in the nature of law Interesting though this question may be from a theoretical standpoint, no great consequences follow from it. Most legal authors regard standard conditions as a form of contractual terms forming the *lex* only for an individual contract, and the fact that it is usual in certain circumstances to incorporate standard conditions does not make any difference (*a*) Though it would be in the interests of some persons if the conditions they impose on their customers partook of the nature of law, the natural guardians of the law, the Courts, have in all countries done justice and, it is submitted, can only do justice by looking at the circumstances of each case, and it was only on rare occasions that they took a slightly different view of the matter, and considered it just, in the interests of all persons concerned, to lay down standard rules for standard contracts; this does not represent a recognition of any quasi-legal character, but rather of the special contractual nature of those phenomena.

(2) The preceding chapters should have shown what an enormous part standardized contracts play in business and everyday life. Therefore, it would seem proper to ask: What is the significance of these standard terms ? There can be no doubt that up to a certain point they have benefited all concerned. The person issuing the forms is saved the trouble

(*a*) Raiser, *l c*, pp. 58—89, von Tuhr, *Allgemeiner Teil des Schweizerischen Obligationenrechts*, vol. 1, 1924, p. 121

of bargaining where identical contracts are made in large numbers. Moreover, a business man is in a better position to make calculations if he knows that, say, the damages he may have to pay will not exceed a certain sum in each individual case. It is also beneficial to a customer of a great undertaking or combine to know that he will be granted equal terms with his fellow customers. Thus it appears that the fact of standardized terms serves both parties. The conflict of interests only arises as to their contents.

Apart from expediency, the science of law as a whole owes a debt to this form of agreement No code, however well drafted, will be able to provide for all contingencies. At this point the amending function of contracts comes in, and its effect will increase with the degree of repetition of the same regulation. Thus the Standard Terms and Conditions, 1927, enacted by authority of the Railways Act, 1921, resulted from the experience gained from their predecessors which were imposed by individual railway companies. Again, the Sale of Goods Act, 1893, codifies the common law which in turn was framed by the merchants, and the insurance legislation in all countries utilized the experience of underwriting business which was gained by making contracts for which the law at that time made no adequate provision. Standardized terms are, therefore, a force not lightly to be dispensed with by any law The latter will often gain when drawing on this vast reservoir of quasi-legal experience represented by commercial draftsmen.

(3) On the other hand, it is just this quasi-legislative activity which ought to put and does put the authorities on the alert The contents of this research should have shown to a certain extent how much of the State-made law is ousted and disregarded by the trade. In the near future it is proposed to show with regard to one or two departments of the law exactly how little of the general law really remains in the field of organized business life. If the State should let this situation drift, it may one day find itself at a formidable *impasse*. The combination of economic power and variety of business interests has already produced

an uncertainty of the law which makes the task of the citizen extremely difficult when he seeks to enforce what he believes to be his right. When the student of the law of contract has succeeded in mastering the rules of the common law he is confronted with a chaos of individual sets of provisions for various sorts of contracts altering, and, as often as not, setting at nought, the efforts of the common law to balance the conflicting interests of citizens and State in a just and equitable way. Only in a superficial sense is it true to say that there exists one law relating to the sale of goods. In fact several laws obtain for the sale of corn, of silk, of cotton, of machines, &c., and these examples could be multiplied by describing the situation in other trades. Quite apart from the uncertainty of the law, the authority of the State and its supreme power, the legislature, is threatened In a great number of cases trade and industry have abused the freedom which was accorded to them by the very quarter to which it owes its existence

(4) The consequence of such combined abuse need not be set out in detail. The question arises how to guard against it. For it cannot be allowed to pass unnoticed, unremedied, or at least uncontrolled, that a vast number of citizens are forced to satisfy their needs under terms of which they have no knowledge in detail and which are not prescribed by a public authority with a public conscience and representative of the nation, but by a private body without public responsibility and only with a view to the furthering of its own interests. The draftsman of standard terms does an ill-service to his employer if he leaves out of his deliberations the public welfare. By doing so he only excites forces of reaction which might overthrow also the good when trying to abolish the bad.

Such reaction will naturally vary with the form of the constitution and the philosophy of each State. The method and degree of State action will depend on whether a State is more "capitalist" or more "socialist," whether it is democratic or dictatorial, whether its administration of justice is efficient or inefficient, cheap or dear.

These are briefly the instruments of control: Courts of law, legislature, and administration.

(5) The first recourse of the aggrieved will always be to the Court, and this will be able to put right many complaints, but not all of them. One has only to realise what a small proportion of matters is and can be heard in the Courts to be convinced that these institutions are not the right authority to remedy wholesale grievances.

(6) This can be done, and is done more effectively by the legislature; witness the laws of insurance in various countries. This method, however, has a serious disadvantage It does away with the flexibility without which only very few trades can do. It enlarges the business man's risk and does not allow him to take measures against its increase, measures which only he can devise and which must be applied rapidly Legislative compulsion works best where a trade has grown into a quasi-governmental function, as, *e g*, insurance or traffic; it is almost impossible in all other branches. The change of traffic routes through political developments, the starting of new industries, bad crops, new inventions, migration, settlement, and a host of other factors cannot be divined by the legislature, the undertaker must alone be in a position to adapt himself. But what happens if he behaves unsocially, and the Courts are not in a position to put this right?

(7) Distasteful though it may seem to many persons, the only logical possibility remaining is interference by the administrative authorities. This can take effect by an extension of the licensing system, by decree, and police action. It is in constant use only in dictatorial States with consequences which cannot be discussed here. It might, in other countries also, remain as the only road which is open to the authorities who are bound to assert themselves against an ever increasing stream of quasi-legislation and monopolistic powers exercised by private individuals. May the latters' conscience make unnecessary such interference with the freedom of contract!

INDEX.

PRINTED BY C. F. ROWORTH LTD., 88 FETTER LANE, LONDON, E.C.4.